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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SAMUEL A. DUBYAK, Petitioner, **v.** **BEN CURRY, WARDEN,** Respondent.	C 08-0667 JSW **RESPONDENT'S MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES** Judge: The Honorable Jeffrey S. White

TO PETITIONER SAMUEL DUBYAK, IN PRO PER:

PLEASE TAKE NOTICE THAT pursuant to 28 U.S.C. § 2254 and Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts, Respondent moves the Court for an order dismissing the above-entitled action on the ground that petitioner has not exhausted state judicial remedies for all claims presented. Failure to oppose this motion may result in dismissal of the action. Since petitioner is not represented by counsel and is proceeding in pro per, this motion will be decided on the papers without a hearing.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Petitioner Samuel Dubyak filed a Petition for Writ of Habeas Corpus in this Court on January 28, 2008, raising several claims regarding the Board of Parole Hearings' October 24, 2006 decision finding him unsuitable for parole. Because Dubyak did not fairly present these claims to the California Supreme Court, he failed to properly exhaust state court remedies for his claims. Therefore, this Court should dismiss this Petition.

ARGUMENT

I.

THE COURT SHOULD DISMISS DUBYAK'S PETITION BECAUSE HE FAILED TO PROPERLY EXHAUST HIS CLAIMS BEFORE THE CALIFORNIA SUPREME COURT.

Prisoners in state custody who wish to challenge collaterally in federal court either the fact or length of their confinement by a petition for writ of habeas corpus are first required to exhaust state judicial remedies by presenting the highest state court available with a fair opportunity to rule on the merits of each and every issue they seek to raise in federal court. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 134 (1987); *McNeeley v. Arave*, 842 F.2d 230, 231 (9th Cir. 1988). It is the petitioner's burden to prove he has exhausted his state court remedies before filing his federal habeas petition. *Williams v. Craven*, 460 F.2d 1253, 1254 (9th Cir. 1972) (per curiam). To satisfy this requirement, a petitioner must "fairly present" the substance of his federal claim to the state court to provide that court a "fair opportunity" to apply controlling legal principles to the facts bearing upon his constitutional claim. *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Thus, a claim for habeas relief must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief. *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996).

"[O]rdinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Baldwin v. Reese*, 541 U.S. 27, 32 (2004). In *Baldwin*, the Supreme Court found

that an Oregon inmate who attached lower court decisions to his state supreme court petition had not fairly presented his claim, even though the state supreme court had the opportunity to read these attached opinions. *Id.* at 30-32. Federal habeas corpus law did not mandate that the Oregon Supreme Court read the lower court opinions in order to discover a federal claim. *Id.* at 31; *see also O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

Similarly, in *Gatlin v. Madding*, 189 F.3d 882 (9th Cir. 1999), the Ninth Circuit held that a petition for review that incorporates by reference arguments raised in a brief to the lower state appellate court clearly contravenes California Rule of Court 28. *Id.* at 888 (citing Cal. R. of Ct. 28(e)(5)[1]). Thus, because the petitioner's incorporation only by reference was contrary to state rules, the Ninth Circuit determined that it constituted a failure to exhaust. *Id.* The court was also not obliged to construe a pro se petitioner's papers more liberally, as the exhaustion requirement applies equally because "just as pro se petitioners have managed to use the federal habeas machinery, so too should they be able to master this straightforward exhaustion requirement." *Id.* at 889 (citing *Rose v. Lundy*, 455 U.S. 509, 520 (1982).)

Here, Dubyak's petition for review to the California Supreme Court does not "fairly present" his due process claims. (Ex. 1, Cal. Sup. Ct. Pet.) The state petition, rather, consisted of one page in which he failed to plead any specific facts, including the date of his contested parole hearing. *Gray v. Netherland*, 518 U.S. at 162-63. The only mention of any federal claim involves a citation to *City of Auburn v. Quest Corp.*, 260 F.3d 1160 (9th Cir. 2001) in support of his contention that "state courts are obligated to apply and adjudicate federal claims that were fairly presented to them."[2] (Ex. 1.) However, this case opinion does not support Dubyak's

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1. The California Rules of Court were renumbered, effective January 1, 2007. Rule 28 is now California Rules of Court, rule 8.504.

2. The citation for the amended Opinion of April 24, 2001 is reported at 2001 U.S. App. LEXIS 15518.

argument.[3/] In addition to failing to state a federal claim, Dubyak incorporated by reference his lower court petitions and the appellate and superior court decisions. (*Id.*) Given *Gatlin's* identical set of facts and express prohibition of incorporation by reference under California Rule of Court 28, Dubyak has failed to exhaust his state court remedies. *Gatlin v. Madding*, 189 F.3d at 888-889. Dubyak also cannot rely on the fact that he is representing himself pro se. *Id* at 889. Therefore, Dubyak has not met his burden of exhaustion under 28 U.S.C. § 2254. *Baldwin v. Reese*, 541 U.S. at 32.

Federal courts impose a requirement of "total exhaustion" with respect to federal habeas petitions. *Rhines v. Weber*, 544 U.S. 269, 274 (2005). The proper remedy, therefore, is to allow a petitioner to amend the petition to delete the unexhausted claims, or accept dismissal without prejudice to pursuing the unexhausted claims in state court. *Rose v. Lundy*, 455 U.S. at 510. As Dubyak has not exhausted any of his claims, this Court should dismiss the Petition without prejudice to allow him to return to the California state courts and fairly present his claims.

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3. The Supremacy Clause issue which petitioner refers to in his petition for review is not relevant to the California Supreme Court's review of any of his claims. Rather, this case adjudicated whether state law and the Federal Telecommunications Act of 1996 preempt certain city ordinances that establish a franchise system to manage telecommunications facilities in rights-of-way. *Auburn*, 260 F.3d 1165-66, 1180-81.

CONCLUSION

Dubyak did not fairly present his claims to the California Supreme Court and therefore he has not exhausted his state judicial remedies. Therefore, the Court should dismiss this Petition without prejudice to allow Dubyak to return to state court to exhaust his claims.

Dated: August 20, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

JULIE L. GARLAND
Senior Assistant Attorney General

JESSICA N. BLONIEN
Supervising Deputy Attorney General

Stacey D. Schesser

STACEY D. SCHESSER
Deputy Attorney General
Attorneys for Respondent

20131525.wpd
SF2008401606

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Dubyak v. Curry**

No.: **C 08-0667 JSW**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 21, 2008, I served the attached

RESPONDENT'S MOTION TO DISMISS;
MEMORANDUM OF POINTS AND AUTHORITIES

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Samuel Allen Dubyak, D54700
CTF-Central
P.O. Box 689
Soledad, CA 93960-0689
In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 21, 2008, at San Francisco, California.

L. Santos
Declarant

Signature

20134145.wpd

EXHIBIT 1

ORIGINAL

MC-275

Name Samuel A. Dubyak

Address Box 689 C-115L

California State Prison

Soledad, CA 93960-0689

CDC or ID Number D-54700

S157841

SUPREME COURT
FILED

NOV 5 - 2007

Frederick K. Ohlrich Clerk

DEPUTY

SUPREME COURT OF CALIFORNIA

AT SAN FRANCISCO
(Court)

SAMUEL A DUBYAK
Petitioner

vs.

BEN CURRY, Warden
Respondent

~~PETITION FOR WRIT OF HABEAS CORPUS~~

PETITION FOR REVIEW

No. _____
(To be supplied by the Clerk of the Court)

EVIDENTIARY HEARING REQUESTED

INSTRUCTIONS—READ CAREFULLY

- **If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.**
- **If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.**

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court [as amended effective January 1, 2007]. Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

This petition concerns:

- ☐ A conviction
- ☐ Parole
- ☐ A sentence
- ☐ Credits
- ☐ Jail or prison conditions
- ☐ Prison discipline
- ☒ Other *(specify)*: violation of due process at a parole suitability hearing.

1. Your name: Samuel A. Dubyak
2. Where are you incarcerated? CTF-Central, Soledad, California
3. Why are you in custody? ☒ Criminal Conviction ☐ Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

First degree murder with gun use enhancement

b. Penal or other code sections: P.C. §§187 & 12022.5

c. Name and location of sentencing or committing court: Superior Court of San Bernardino County, Cucamonga, California

d. Case number: OCR-12056

e. Date convicted or committed: February, 1987

f. Date sentenced: February-March, 1987

g. Length of sentence: 25 years to life plus 2 years

h. When do you expect to be released? Unknown due to current politics

i. Were you represented by counsel in the trial court? ☒ Yes. ☐ No. If yes, state the attorney's name and address:

Michael J. calvert, current address unknown

4. What was the LAST plea you entered? *(check one)*

☒ Not guilty ☐ Guilty ☐ Nolo Contendere ☐ Other:

5. If you pleaded not guilty, what kind of trial did you have?

☒ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." *(If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)*

See attached petition

a. Supporting facts:
Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who* did exactly *what* to violate your rights at what time *(when)* or place *(where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

See attached petition

b. Supporting cases, rules, or other authority (optional):
(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

See attached petition

7. **Ground 2 or Ground** _____ *(if applicable):*

See attached petition

a. Supporting facts:

See attached petition

b. Supporting cases, rules, or other authority:

See attached petition

8. Did you appeal from the conviction, sentence, or commitment? [XX] Yes. [ ] No. If yes, give the following information:
   a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):
   Does not apply to this instant petition before this Court
   b. Result N/A c. Date of decision: N/A
   d. Case number or citation of opinion, if known: Does not apply
   e. Issues raised: (1) //
   (2) //
   (3) //
   f. Were you represented by counsel on appeal? [YX] Yes. [ ] No. If yes, state the attorney's name and address, if known:
   William Flenniken, San Francisco, CA (??)
9. Did you seek review in the California Supreme Court? [XX] Yes [ ] No. If yes, give the following information:
   a. Result N/A b. Date of decision: N/A
   c. Case number or citation of opinion, if known: Does not apply
   d. Issues raised: (1) //
   (2) //
   (3) //
10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:
   Does not apply to this instant petition before this Court
11. Administrative Review:
   a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:
   There is no administrative review available for parole board denials
   b. Did you seek the highest level of administrative review available? [ ] Yes. [XX] NoDoes not apply
   Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? [XX] Yes. If yes, continue with number 13. [ ] No. If no, skip to number 15.

13. a. (1) Name of court: Superior Court of San Bernardino, CA.

(2) Nature of proceeding (for example, "habeas corpus petition"): Habeas Corpus petition

(3) Issues raised: (a) See attached petition in full as presented to the court.

(b) Same as above

(4) Result *(Attach order or explain why unavailable)*: Justice denied

(5) Date of decision: August 20, 2007

b. (1) Name of court: Second Appellate District Court at Riverside, CA

(2) Nature of proceeding: Habeas corpus petition/petition for review

(3) Issues raised: (a) See attached petition in full as presented to the court.

(b) Same as above

(4) Result *(Attach order or explain why unavailable)*: Post card denial on the merits, attached hereto

(5) Date of decision: October 25, 2007

c. *For additional prior petitions, applications, or motions, provide the same information on a separate page.*

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

No hearings held nor was the petition properly adjudicated

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

No delay is asserted although Petitioner's transcripts were 9 months late

16. Are you presently represented by counsel? [ ] Yes. [XX] No. If yes, state the attorney's name and address, if known:

Petitioner is pro se and an obvious layman at law

17. Do you have any petition, appeal, or other matter pending in any court? [XX] Yes. [ ] No. If yes, explain:

Habeas corpus in Northern District of California, Case No. C-06-0707 JSW (pr)

In re, first suitability hearing denial in 2003

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

This is the highest state court prior to filing in the federal courts

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: 10-30-07

(SIGNATURE OF PETITIONER)

PETITION FOR REVIEW

IN THE

SUPREME COURT OF CALIFORNIA

Comes now, Samuel A. Dubyak, Petitioner in pro se, and through this verified petition for review requests this Honorable Court to review and adjudicate the claims raised thus reviewing the denial(s) from the Appellate and Superior Courts (attached hereto) as both are without a 'reasoned opinion', semi post card denials.

Petitioner contends that the denial by the Superior Court was a miscarriage of the intent of the habeas corpus act as the Superior courts obvious biased language simply because petitioner has claimed innocence, and that court did not adjudicate the "CLASS OF ONE" claim that is independent of being found suitable for parole by the Board.

The Appellate Court's 'post card denial' was a denial on the merits (citations) and that court failed to give a 'reasoned opinion'.

As this Court will discover upon a full and fair reading of this petition for review, the lower courts were obligated to consider 'all'' issues/claims and not just make a finding that; "Petitioner's calculating nature, coupled with his persistent denial of culpability, and his stubborn refusal to program as directed.." (Emphasis added). The courts failed to consider the facts of the petition and only relied on the Board's form/rote language and the courts obvious bias is clear because Petitioner, after 21 years, still maintains actual innocence.

In the case of City of Auburn v. Quest Corp., 260 F.3d 1160 (9th Cir. 2001): Under the Supremacy Clause, the state courts are obligated to apply and adjudicate federal claims that were fairly presented to them.

Respectfully submitted,

Samuel A. Dubyak

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

ORDER

In re SAMUEL A. DUBYAK

E044276

on Habeas Corpus.

(Super.Ct.Nos. OCR12056 & WHCSS700257)

The County of San Bernardino

THE COURT

The petition for writ of habeas corpus is DENIED.

McKINSTER

Acting P.J.

cc: See attached list

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
Civil Division, Department S-32
303 West Third Street
San Bernardino, California 92415

COPY

FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

AUG 20 2007

BY Olivia McDonald
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

SAN BERNARDINO DISTRICT

In re the Petition of SAMUEL A. DUBYAK, For Writ of Habeas Corpus.	Case No. WHCSS-~~0257~~ 700257 ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

The Petition of SAMUEL A. DUBYAK for Writ of Habeas Corpus was filed in this Court on August 9, 2007.

Therein, Petitioner contends that there was no evidence presented which justified the denial of his parole on October 24, 2006.

From the transcript of the suitability hearing, the court determines that the eligibility board considered the following factors and facts:

1) The circumstances of the committing offense.

Petitioner shot his wife to death in her bed in the family home. He attempted to destroy the evidence of the murder, the bed, by cutting out of the mattress the bloody bullet holes and dumping the bed along the side of the road. He falsely claimed to police officers that his wife had disappeared and taken the bed with her. He manufactured a letter on which he forged his wife's signature so that it would appear that his wife was still alive. He persists in claims of innocence.

2) Prior criminal record.

He had a burglary arrest as a juvenile but no prior criminal convictions.

3) Social History.

Petitioner had been a commercial pilot. He has had five children. He did not abuse alcohol or drugs.

4) Conduct while incarcerated.

Petitioner has had very few, and only minor, disciplinary experiences while incarcerated. He has taken numerous college courses, and has completed a Real Estate course, and an Accounting course. He obtained a B.A. in 2001. He has studied French and Spanish.

5) Psychological Assessments.

His violence potential is lower than that of the average citizen.

6) Parole Plans.

Based on the evidence before it, the panel concluded that Petitioner poses an unreasonable risk of danger to society if released. (The transcript says the opposite but it is clear from the context what was meant).

Petitioner's calculating nature, coupled with his persistent denial of culpability, and his stubborn refusal to program as directed by the eligibility board would give any reasonable person a deep concern that Petitioner might harm others if the circumstances justified it, to his mind.

There was ample evidence presented to justify the board's decision.

The Petition is denied.

Dated this 20th day of August, 2007.

JOHN P. WADE

JOHN P. WADE
Judge of the Superior Court

To the Honorable Judges of the california Courts of Appeal

Comes now, Samuel A. Dubyak, Petitioner in pro se, and hereby petitions this Court for a writ of habeas corpus and through this petition sets forth the facts and causes for issuance of the writ.

I.

Petitioner is presently incarcerated and confined from his liberty by Warden Curry, at the state prison, Soledad, CA. Petitioner is serving a sentence of 25 years 'to life' plus 2 years, pursuant to a judgment imposed by the San Bernardino County Superior Court, Cucamonga, California.

II.

Petitioner hereby incorporates all relevant exhibits, and parole hearing transcripts, numbered and referenced throughout this petition. Petitioner also incorporates a MOTION/REQUEST FOR JUDICIAL NOTICE, attached hereto.

III.

Petitioner asserts that he was found suitable for parole and that he was also found to not be a threat to society, but, his term and release date were not set, in violation of Penal Code §3041(a) and the equal protection clauses of the United States and California Constitutions as set forth in the instant petition.

IV.

Petitioner has no plain, speedy or adequate remedy at law to protect his constitutional rights on these issues other than by this verified petition for writ of habeas corpus.

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STATEMENT OF THE CASE

Petitioner incorporates the statement of facts (summary of commitment offense) from the parole hearing transcripts, as though set forth in full, (herein after Ex. "A" pp.##).

FACTS AS SET FORTH

On October 24, 2006 Petitioner appeared before the Board of Parole Hearings (herein after "Board") for a subsequent hearing, his second (2nd) hearing. As Ex. "A" establishes, Petitioner was suitable for parole and would not pose a risk to society, nonetheless the Board denied a term set and/or release date for Petitioner. The record supports the fact that Petitioner was suitable for parole and there was no evidence in the record to deny his release.

Petitioner's second hearing was 2 months late and 9 months late in receiving the transcripts, see attached order from Monterey County Superior Court and the attorney General's reply, attached hereto.

JURISDICTION AND VENUE

Habeas corpus is the proper remedy for due process violations by the Board. In re Powell (1988) 45 Cal.3d 894, 903. This Court has original jurisdiction to issue the writ, Cal. Const., Art. VI, §10; Cal. P.C. §1508, and venue to adjudicate this petition. Griggs v. Superior Court (1976) 16 Cal.3d 341; see also, In re Sena (2001) 94 Cal.App.4th 836.

This Court also issued an ORDER TO SHOW CAUSE on Petitioner's "first" parole suitability denial, which is currently before the Northern District Court in San Francisco.

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STATE AND FEDERAL CLAIM NUMBER ONE (I)
CALIFORNIA PENAL CODE §3041(a)(b) CREATES A PROTECTABLE LIBERTY INTEREST AT A PAROLE SUITABILITY HEARING, AND A "REASONABLE" EXPECTATION OF A RELEASE DATE. THE COMMANDING WORD "SHALL" CLEARLY ESTABLISHES THIS EXPECTATION.

Under California law, a convicted person sentenced to a term of 15/25 years 'to life' shall be released on parole unless his release would pose an unreasonable risk to public safety or unreasonable risk to society if released from prison. Cal. P.C. §3041(a)(b); Cal. Code of Regs., Title 15, §§2400-2411.

DUE PROCESS IN THE PAROLE CONTEXT

The Fifth and Fourteenth Amendments prohibit the government from depriving an inmate of life, liberty, or property without due process of law. United States Constitutional Amendments, V, XIV.

It is now settled that California parole scheme, codified in California Penal Code section §3041, vests all "prisoners whose sentences provide for the possibility of parole with a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of the Due Process Clause." Irons v. Carey, 479 F.3d 658, 662 (9th Cir. 2007) (citing Sass v. California Board of Prison Terms, 461 F.3d 1123, 1128 (9th Cir. 2006); Biggs v. Terhune, 334 F.3d 910, 914 (9th Cir. 2003); McQuillon v. Duncan, 306 F.3d 895, 903 (9th Cir. 2002)).

Under the "clearly established" framework of Greenholtz and Allen, we hold that California's parole scheme gives rise to a cognizable liberty interest on parole. The scheme "creates a presumption that parole release will be granted" unless the statutorily defined determinations are made." Allen, 482 at 378 (quoting Greenholtz, 442 U.S. at 12). In, In re Deluna, 126 Cal.App.4th 585, 24 Cal.Rptr.3d 643 (2005), held that under Rosenkrantz and McQuillon, parole applicants continue to have a "liberty interest" in parole release.

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STATE AND FEDERAL CLAIM NUMBER TWO (II)

THE BOARD (BPH) VIOLATED PETITIONER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION, AND, CALIFORNIA CONSTITUTION ARTICLE I, Sec. 7(a), WHEN THEY FAILED TO SET A RELEASE DATE AND/OR UNIFORM TERM AFTER PETITIONER WAS FOUND SUITABLE FOR PAROLE AND FOUND NOT TO BE A THREAT TO PUBLIC SAFETY.

On October 24, 2006 Petitioner went before the Board of Prison Hearings (herein after "Board") for his second/subsequent suitability hearing, the subject of the instant petition before this Court.

The panel consisted of James Davis, Presiding Commissioner, Noreen Blonien, Deputy Commissioner, Peter Ferguson, Petitioner's Board appointed attorney.

As the record establishes, Petitioner did not receive his hearing transcripts until July 23, 2007, 9 months late and 2 months late on the 2nd hearing, see attached Monterey County Order and the Attorney General's response attached hereto.

Petitioner submits that he was found suitable, and, would not pose a threat to the public at his hearing (Exhibit "A" p.39):

Commissioner Davis stated at (Ex "A") p.39: "...the panel reviewed all the information received from the public and relied on the following circumstances in concluding that the prisoner suitable for parole and would not pose unreasonable risk of danger to society or threat to public safety if released from prison." (Emphasis added). Therefore Penal Code §3041(b) has been satisfied in that Petitioner does not pose a threat to public safety.

The "overarching consideration" in determining whether to grant parole "is 'public safety.'" (See, In re Scott (2005) 133 Cal.App.4th 573, 591 (Scott II).) That is, under the applicable "Penal Code section §3041, the Board 'shall set a release date unless it determines that the gravity of the current convicted ... offenses, or the timing and gravity of current or past convicted ... offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual...'". The goal of subdivision (a) of Penal

Code section §3041, it has been noted, is that "release on parole is the rule, rather that the exception." (In re Smith (2003) 114 Cal.App.4th 343, 351 (Smith) accord In re Lee (2006) 143 Cal.App.4th 1400, 1405 (Lee) ["defendant sentenced to indeterminate life term is normally entitled to parole if the board finds he does not pose an unreasonable risk to public safety"]). (In re David Barker, 2007 DJDAR 7548, May 24, 2007).

As the Court of Appeal put it in Lee, 143 Cal.App.4th, p.1414: "To deny parole, the reason must relate to a defendant's continued unreasonable risk to public safety."

"A life term offense or any other offenses underlying an indeterminate sentence must be particularly egregious to justify the denial of a parole date." (Rosenkrantz, 29 Cal.4th at p.683, 128 Cal.Rptr.2d 104, 59 P.3d 174). Also, In re Ramirez, (9-13-2000), (94 Cal.App.4th 549), that court held that: parole could not be withheld absent a factual finding that the offense was "particularly egregious".

As Exhibit "A" establishes, not only was Petitioner found suitable for parole, and, would not pose unreasonable risk of danger to society or threat to public safety (at p.39), it is evident from the record (pages 39-43) that the Board used the following excuses from their Rules and Regulations, Title 15, §2402 criteria to deny a release date and/or a uniform term setting under P.C. §3041(a):

1). "dispassionate and calculated." (p.39). Note* Subdivision (c) of §2402 sets forth six factors tending to show unsuitability for parole, which include: (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder. Therefore "dispassionate and calculated manner" cannot be applied to Petitioner as he was not tried or convicted of an execution-style murder.

2). "motive ... inexplicable." (p.39).

3). "Juvenile arrest (no disposition) in 1957." (p.39).

4). "used a firearm." (p.39).

5). "programmed ... limited manner." (p.39).

6). "one 128 counseling chrono." (p.40).

7). "one serious 115 in 1994." (Classified as 'Administrative'). (p.40).

It is apparent that there is "no evidence" in the record under either the "some evidence" standard, or, "preponderance of evidence" standard, or, even a "modicum" of evidence to support the Board's arbitrary action in not setting a release date for Petitioner after he was found suitable or a term setting as the record establishes that Petitioner has passed through the 'gateway' imposed by §3041(b) to enter into the realm of §3041(a).

The Board's arbitrary action to not follow Penal Code §3041(a) deprived Petitioner of a parole date by not calculating his term. The Board cannot apply or use Title 15 C.C.R. §§2400-2411 to over-ride the Legislative intent of P.C. §3041(a)(b). Subsection (b):

> "The panel or board shall set a release date unless it determines that the gravity of the current offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting."
>
> "After the effective date of this subdivision, any decision of the parole panel finding an inmate suitable for parole shall become final within 120 days of the date of the hearing." (Note* Petitioner's hearing was on October 24, 2006, and, became final within the intent of P.C. §3041(b), on February 21, 2007.)

When an administrative regulation conflicts with a statute, the statute controls. (Government Code §11342.2).

Regulations that contravenes a statute is/are invalid. R & W Flammann GMBH v. U.S., 339 F.3d 1320 (Fed. Cir. 2003).

A statute by its very nature, trumps conflicting regulations. Caldera v. J.S. Alberici Const. Co. Inc., 153 F.3d 1381 (Fed. Cir. 1998).

An agencies regulations cannot legitimate the violations of constitutional or statutory rights. U.S. v. Marolf, 173 F.3d 1213 (9th Cir. 1999).

A regulation (Title 15 C.C.R. §§2400-2411) cannot over-ride a clearly stated statutory enactment (P.C. §3041(a)(b).) Aerolineas Argentinas v. U.S., 77 F.3d 1564 (Fed. Cir. 1996).

In Willis v. Kane, USDC N.D. Cal. No. 05-3153 (April 26, 2007), among other issues, the court held that:

> "Willis' petition for writ of habeas corpus is GRANTED. Having decided that the petition will be granted, the next issue concerns the proper remedy. Because Willis has never been found suitable for parole, the BPH has never moved past the suitability-finding function in California Penal Code §3041(b) to calculate a term and set a release date as required by §3041(a). It is now time to do so. Within thirty days of the date of this order, the BPH must calculate a term for Willis and set a date for his release in accordance with the requirements of California Penal Code §3041(a)." (Emphasis in original).

The California Supreme Court has concluded that the "nature of the prisoner's offense, alone, can constitute a sufficient basis for denying parole." Dannenberg, 29 Cal.4th at p.682. One indicator of parole unsuitability is that "[t]he prisoner committed the offense in an especially heinous, atrocious or cruel manner." (Regs., §2402, subd. (c)(1).) The Dannenberg majority decided that the Board and Governor can find the commitment offense to be especially heinous, atrocious or cruel so long as the crime involved elements beyond "the minimum necessary to sustain a conviction for that offense," without comparing the crime to other similar crimes. (Dannenberg, supra, 34 Cal.4th at pp. 10941098). (See, In re BRANDEE TRIPP, 2007 DJDAR 5877).

Nonetheless, the Board found Petitioner 'suitable' and 'that he would not pose a threat to the public'. It is apparent that the Board did not set a uniform term, (See, P.C. §3041(a)), within the Matrix, as Petitioner has currently served 28 years (inclusive of earned credits), and, the Boards citations to Petitioner's commitment offense, a 50 year old juvenile issue (with no disposition), his 128 counseling chrono, a 115 with an age of 13 years which was an "administrative"

action because of mailing out legal work for another inmate (proof of service), Petitioner's use of a firearm, his alleged lack of programming although Petitioner works on college courses, studies 2 languages, does video reports, and, the fact that the denial of a release date for '3' years with EXACTLY the same rote language as was used to deny Petitioner's release and/or uniform term setting.

At p.41 of (Ex. "A"): "With regard to parole plans, we find that you do have appropriate residential parole plans." "With regard to employment, the Panel notes that you are eligible for Social Security."

One of the implementing regulations, 15 Cal. Code Regs. §2401, provides: A parole date shall be set if the prisoner is found suitable for parole under Section 2402(d). "A parole date set under this article shall be set in a manner that provides uniform terms for offenses of similar gravity and magnitude with respect to the threat to the public." The regulation also provides that "[t]he panel shall first determine whether the life prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." Under state law, the matrix is not reached unless and until the prisoner is found suitable for parole. Id at 1070-71; 15 Cal. Code Regs. §2403(a) ("[t]he panel shall set a base term for each life prisoner who is found suitable for parole"). See, Thomas v. Brown, USDC N.D. Cal., No. C05-1332, Dec. 21, 2006.

Although Petitioner was found suitable, and, would not pose a risk to society, CLAIM (III) establishes that an inmate does not have to be found suitable to receive a uniform term set and/or release date. See, Exhibits "B & C".

The "PSYCHOLOGICAL EVALUATION", dated August 2006, (Ex. "D"), "his violence potential is lower than the average citizen." Supporting the Board's conclusion that Petitioner would not pose a risk to society, also, no where in the Evaluation is there a need for any 'anger management' self-help book reports.

STATE AND FEDERAL CLAIM NUMBER THREE (III)

THE BOARD (BPH) VIOLATED PETITIONER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION, AND, CALIFORNIA CONSTITUTION ARTICLE I, Sec. 7(a), WHEN THEY FAILED TO CONSIDER A PAROLE RELEASE DATE UNDER P.C. Section §3041(a), (SEPARATE AND DISTINCT TREATMENT OF A "CLASS OF ONE").

For an equal protection claim to proceed Petitioner must allege specific facts in support of his claim. A habeas petitioner has the burden of alleging specific facts that show a federal claim is presented, or the petition is subject to dismissal. Jones v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995). Conclusory allegations do not warrant habeas relief. Id. at 204.

Petitioner's allegations are not conclusory, they state a prima facie equal protection claim under both the California and U.S. Constitution.

The U.S. Constitutions Fourteenth Amendment Equal Protection Clause provides that no State shall deny to any person "the equal protection of the laws." See also, California Constitution Article I, Sec. 7(a). The Equal Protection Clause ensures that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). To prevail on an equal protection claim, Petitioner must initially show that he was treated differently from other similarly situated persons. City of Cleburne, supra, 473 U.S. at 439; Fraley v. U.S. Bureau of Prisons, 1 F.3d 924, 926 (9th Cir. 1993).

The mere fact that some inmates convicted of second degree murder may have been paroled sooner than Petitioner does not establish the basis for a federal equal protection claim. See, Sturm v. California Adult Authority, 395 F.2d 446, 448-49 (9th Cir. 1967) (holding that, "the fact that other prisoners have had their sentence reduced, or been granted parole, affords no ground for complaint by petitioner.")

However, Petitioner's equal protection claim lies elsewhere, other than a mere comparison between an inmate released earlier or paroled sooner than himself, as set forth herein.

EQUAL PROTECTION UNDER "CLASS OF ONE"

In the case of In re MIKAEL SCHIOLD, Court of Appeals, First Appellate District, Division Five, Case No. A103107, attached hereto with MOTION FOR JUDICIAL NOTICE, as Exhibit "B". (With reference to numbered paragraphs).

Schiold was transferred to the country of Sweden, under the "SETTLEMENT AGREEMENT AND FULL AND FINAL RELEASE OF ALL CLAIMS", on habeas corpus. Schiold and Respondents entered into a "SETTLEMENT AGREEMENT" transferring Schiold to Sweden. (Paragraph #4 of Exhibit "B").

Case No. A103107 was agreed to as "stayed" pending Schiold's transfer. (Paragraphs #5,6,7, of Exhibit "B").

Explicitly at paragraph #8 (of Exhibit "B"): "Releasor (Schiold) agrees that he will be held in custody by the government of Sweden until January 1, 2007."

Page 5, paragraph #16 (of Exhibit "B"), establishes that: The agreement and settlement, in order to stay the case, was signed by the Supervising Deputy Attorney General, Anya Binsacca, dated 10/22/2003.

Petitioner asserts that the State of California in collusion with the Attorney General's Office and the Board did in fact violate the equal protection clause of the Fourteenth Amendment of the U.S. Constitution, and, California Constitution Article I, Sec. 7(a), by "setting an immutable release date" for Schiold, when his term was set without being found suitable under §3041(b) and going directly to §3041(a).

The language in paragraph #8 of page 3 (of Exhibit "B"), of the "SETTLEMENT AGREEMENT" expressly states that "he will be held in custody of the government of Sweden UNTIL January 1, 2007." Petitioner asserts that this date, January 1, 2007, established a 'term setting' under §3041(a). (Emphasis added).

A foreign national (Schiold) is being treated distinctly different than 'all' U.S. Citizens, and, foreign nationals that have not caused legal actions

to enter into "SETTLEMENT AGREEMENTS", in California serving a sentence of life with the possibility of parole. Petitioner is being treated distinctly different than Schiold because he cannot be transferred to another country, and all similarly situated prisoners, thus creating separate and distinct "classes" of inmates for release criteria.

The fact that Schiold was found suitable by the Board is irrelevant to the claim herein, as the Governor over-ruled the Board's determination and found Schiold to be unsuitable, which nullified the Board's finding of suitability. See, paragraphs #2,3,6 (of Exhibit "B"). Schiold's term was set at January 1, 2007, AND, Schiold does not have to serve any parole time after being released. See, "SETTLEMENT AGREEMENT".

The most basic requirement for a claim of violation of equal protection under the Fourteenth Amendment of the U.S. Constitution lies on the issue of non-equal treatment of a "CLASS", or, a showing of separate and/or distinct difference in treatment, both criminally and civilly, among groups or "CLASSES" of persons.

The U.S. Supreme Court has established a "class of one" in the case of Village of Willowbrook v. Olech, 528 U.S. 562, 145 L.Ed.2d 1060, 120 S.Ct. 1073 (2000) at pp.1074-75: "We granted certiorari to determine whether the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" where the plaintiff did not allege membership in a class or group." (527 U.S. 1067, 120 S.Ct. 10, 144 L.Ed.2d 841 (1999).):

> "Whether the complaint alleges a class of one or a class of five is of no consequence because we concluded that the number of individuals in a class is immaterial for equal protection analysis."

Our cases have recognized successful equal protection claims brought by a "class of one", where the plaintiff alleges that he/she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. Sioux City Bridge Co., v. Dakota County,

260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); Allegheny Pittsburg Coal Co. v. Commission of Webster City, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989). "In so doing, we have explained that 'the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its proper execution through duly constituted agents." Sioux City Bridge Co., supra, at p.445, 43 S.Ct. 190 (quoting Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352, 38 S.Ct. 495 (1918).)

"It is clearly established that a state violates the equal protection clauses when it treats one set of persons differently from others who are similarly situated." Wheeler v. Miller, 168 F.3d 241, 252 (5th Cir. 1999).

Petitioner has established separate treatment, discrimination, and the Board's failure to follow U.S. Supreme Court precedents, thus their failure to set Petitioner's term, as was done to Schiold, violates both the California and U.S. Constitutions Equal Protection Clauses.

FAILURE TO CONSIDER TERM SETTING

At no time during the hearing(s), nor at any time during Petitioner's incarceration has the Board considered the determinate term that Petitioner would serve, as calculated by Title 15 C.C.R. §2404, (Matrix), or the time he has actually served as factors in the suitability equation. The Court of Appeals in, In re Ramirez, (2001) 94 Cal.App.4th 549, at 569 held:

> "The Board cannot ignore the determinate term prescribed for a commitment offense when it considers the gravity of the crime as a factor weighing against a finding of suitability for parole. The Board must make its determination 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public.' (P.C. §3041(a).) Determining what would be a 'uniform' term for an inmate serving a determinate term for offenses that include concurrent determinate terms is not an exact science. However, the Board should strive to achieve at least a rough balance between the gravity of the offense, the time the inmate has served, and the sentences prescribed by law for the commitment offense."

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At page 570, the court said:

> "The Board must also consider the length of time the inmate has served in relation to the terms prescribed by the Legislature for the offenses under consideration, in order to arrive at a "uniform" term as contemplated by P.C. §3041(a)."

The gravity of Petitioner's offense must be measured not in terms of the life maximum potential, but in relation to the determinate terms prescribed for such offenses in 15 C.C.R. §2403(c). The Board must consider the appropriate determinate term that would be set and the time he has already served. The Board has failed to follow the criteria of §2403(c). (Note: The Board is still in violation by rules and regulations that they are applying.)

FAILURE TO FIX PRIMARY TERM

At no time during Petitioner's incarceration has the Board ever held a hearing to fix Petitioner's 'primary term' on his indeterminate sentence. A 'primary term' is not set in conjunction with or dependent upon a parole hearing. In re Rodriguez, (1975) 14 Cal.3d 639; People v. Scott, (1984) 150 Cal.App.3d 910, 918-19. Petitioner has a right to have his term fixed proportionately to his offense and his culpability.

The Los Angeles County Superior Court, on June 26, 2006, In re Robert Rosenkrantz, Case No. BH003529, attached as (Exhibit "C") to MOTION FOR JUDICIAL NOTICE, specifically at page 3, lines 14-15 establish that the Board set Rosenkrantz term: "On September 9, 1999, petitioner was found unsuitable for parole but the panel set his prison term." A June 30, 2001 date was set for release. (Emphasis added).

Evaluating proportionality does not hinge on the life maximum, but is measuring the time actually served with the sentence deemed appropriate by the Board's sentencing regulations. The Board cannot abdicate this responsibility either by saying it has no authority to fix terms (See, Schiold and Rosenkrants, supra), or by sub-summing term-fixing under the parole function. Petitioner is

entitled to the fixing of his primary term as an ultimate, immutable release date, under the Equal Protection (CLASS OF ONE) of the Fourteenth Amendment. See also, In re Rodriguez, supra; People v. Duran, (1983) 140 Cal.App.3d at 502-503; People v. Rodriguez, (1977) 19 Cal.3d 221, 230; Rosenkrants, supra.

In McGinnis v. Royster, 93 S.Ct. (1973) the court held, at page 1057 that:

> "Each inmate has both a 'minimum' parole date, which is the earliest date on which he 'may' be paroled at the discretion of the Parole Board, and a 'statutory release' date which is the earliest date he 'must' be paroled by the Parole Board. (Fn.3), "He also has a maximum expiration date which is the date of the maximum sentence to which an inmate can be held if he receives no good time credits at all."

The case refers to an 'indeterminate sentence' and establishes that there are actually three (3) dates to such a sentence; (1) the minimum parole date, (2) the statutory release date, (3) the maximum expiration date (i.e., death).

While P.C. §1170 et seq., apply to determinate sentences, the current provisions of P.C. §3041 governing parole for inmates serving indeterminate terms were added as part of the bill enacting the Determinate Sentencing Law, and were intended to serve the same purpose as the determinate sentencing provisions. (Stats., 1976 Ch. 1139, Sec. 281, p.5151; In re Stanworth, (1982) 33 Cal.3d 176, 182). Our Supreme Court has made it clear that the 'uniform terms' called for by section §3041(a) are analytically equivalent to determinate sentences imposed under §1170 et seq. (People v. Jefferson, 21 Cal.4th 86, 96).

Apparently, the State of California only follows the law and sets a life prisoner's term when it is convenient, to avoid or terminate legal actions (by entering into "SETTLEMENT AGREEMENTS"), or in an arbitrary manner, with no regard to violating due process and equal protection rights under both California and U.S. Constitutional mandated guidelines.

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STATE AND FEDERAL CLAIM NUMBER FOUR (IV)

THE BOARD VIOLATED PETITIONER'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION, AND, CALIFORNIA CONSTITUTION ARTICLE I, Sec. 7(a), WHEN THEY DENIED PAROLE SUITABILITY BASED ON UNCHANGING FACTORS, i.e. HISTORICAL EVENTS, WITHOUT "SOME EVIDENCE", AND APPLYING ARBITRARY AND CAPRICIOUS CONCLUSIONS TO BOOTSTRAP A PREDETERMINED DENIAL OF SUITABILITY.

Not withstanding Petitioner's CLAIM NUMBER TWO (II), PAGES 2-6 of this petition, also see Superior Court's DENIAL attached hereto, Petitioner asserts this 'some evidence' claim.

At page 39 of exhibit "A", the Boards states:

DECISION

"The panel the panel (sic) reviewed all the information received from the public and relied on the following circumstances in concluding that the prisoner suitable for parole and would not pose unreasonable risk of danger to society or threat to public safety if released from prison."

Page 39: "The offense was carried out in a manner that dispassionate (sic) and calculated."

Page 39: "The motive was inexplicable in relation to the offense." "...used a firearm."

Page 39: "...we find that criminal conduct consists of a juvenile arrest in 1957."

Page 39: "With regard to institutional behavior we find that you programmed while (sic) in a limited manner while incarcerated."

Page 40: The Panel strongly encourages you to look beyond your current education process and look to forms of self-help."

Page 40: "With regard to your other institutional behavior we find that there is one 128 counseling chrono, the last of which was in 4/99 and one serious 115 that's been recorded in 2/1994."

Page 40: "According to the psychological report in August 2006 by Dr. Merek, we find that it is supportive." "The basis of assessing Mr. Dubyak as 'lower than the average citizen.'"

Page 40: "This is the one in 2003 from Dr. Steward, where in the assessment of dangerousness, item B if release (sic) to the community is not (sic) possible to predict the dangerousness since he did not discuss the event and the details of the conviction."

Page 41: "With regard to parole plans, we find that you do have appropriate residential parole plans." "With regard to employment, the Panel notes that you are eligible for Social Security."

Page 41: "These positive aspects of behavior do not outweigh the factors of unsuitability."

3 YEAR DENIAL

Page 41: "In a separate decision, the Hearing Panel finds the prison (sic) has been convicted of murder and it is not reasonable to expect him to that (sic), Page 42: parole to be granted within the next three years." "We come to this conclusion, first and foremost, by the commitment offense." "The offense was carried out in a manner that (sic) dispassionate and calculated manner." "The motive was inexplicable in relation to the offense." "...used a firearm to kill the victim..." "We find that there is criminal conduct that exists with a juvenile arrest in 1957, however that you have programmed in a limited manner while incarcerated." "The panel strongly encourages you to look beyond your current education process and look to other forms of self-help." "There are two incidents of disciplines while incarcerated one a 128 counseling chrono in 4/99 and one serious 115 disciplinary report in 2/1994."

RECOMMENDATIONS

Page 43: "With regard to recommendation, the Panel would recommend that you have no more 115's, 128's and 128(a)s, that you would participate in self-help programs." "I would encourage you that if you do not find a program that are appropriate for you or that you can participate in because you think that limitations that you look to some independent reading in the area of self-help." "And the Panel would accept book reports, some sort of report, two or three paragraphs..."

Petitioner feels it is important to note, the 115 was not classified as "serious" but rather as "administrative" when Petitioner proof of serviced another inmate's legal mail due to prison staff interference with his legal mailings. Secondly, the 1957 alleged arrest, 50 years ago when Petitioner was 14 years old and wrongly entered a dilapidated empty garage while riding a bicycle down an alley, true, Petitioner had no right what so ever to enter the garage but there is no nexus establishing how this 50 year old historical relic supports a denial of suitability.

The Superior Court's scathing denial, attached hereto:

SUPERIOR COURT'S DENIAL

"Based on the evidence before it, the panel concluded that petitioner poses an unreasonable risk of danger to society if released. (The transcript says the opposite but it is clear from the context what was meant)."
"Petitioner's calculating nature, coupled with his persistent denial

of culpability, and his stubborn refusal to program as directed by the eligibility board would give any reasonable person a deep concern that Petitioner might harm others if the circumstances justified it, to his mind." (Emphasis added).

During Petitioner's trial he was offered a 'manslaughter' plea bargain, twice, and acceptable by the trial judge, Petitioner chose to exercise his constitutional right to a trial and was subsequently convicted, 21 years later he is still being punished by the Board and trial court for claiming his innocence, see also P.C. §5011(a)(b). Understanding that Petitioner is only a 'threat' to the public because he did not plead guilty. The trial judge and prosecutor have established over 21 years ago, that Petitioner was not a threat to society within the intent of P.C. §3041(a)(b) because he would have been back among society over 18 years ago.

There are only two (2) excuses given in the superior courts denial; Petitioner's "persistent denial of culpability", and, his "stubborn refusal to program as directed." Obviously a failure in the "some evidence" arena.

DISPASSIONATE AND CALCULATED

Title 15, C.C.R. §2402(c); Unsuitability criteria factors. At (B): The offense was carried out in a dispassionate and calculated manner, such as an execution style murder. Petitioner was not charged with, tried for nor convicted of an "execution style murder" thus this section and wording cannot be applied to his commitment offense.

Courts must ensure that the evidence relied on by the Board in meeting the 'some evidence' standard is both reliable and of a solid value. (Rosenkrantz, 29 Cal.4th 616 at 655; see C.C.R. §§2402(b), 2281(b); see also In re Scott (2005) 133 Cal.App.4th 573, 591.) It is not sufficient for the Board to derive findings from a silent or misconstrued record.

The Board labeled Petitioner's commitment offense as "dispassionate and calculated", "motive was inexplicable", without explaining how it went beyond the usual callousness inherent in the crime of murder. (In re Smith, 114

Cal.App.4th at pp.365-366). Absent such an explanation, the Board's finding violated the "some evidence" standard by failing to support the finding with evidence in the record. (Id., at p.667).

When reviewing the Board's decision, "[t]he test is not whether some evidence supports the reasons ... for denying parole, but whether some evidence indicates a parolee's release unreasonably endangers public safety." (In re Lee (2006) 143 Cal.App.4th 1400, 1408.)

INEXPLICABLE MOTIVE

Regarding the Board's statement that "The motive was inexplicable in relation to the offense." As was observed in Scott I, 119 Cal.App.4th at p.892, "An 'inexplicable' motive, as we understand it, is one that is unexplained or unintelligible, as where the commitment offense does not appear to be related to the conduct of the victim[s] and has no other discernible purpose. A person whose motive for a criminal act cannot be explained or is unintelligible is therefore unusually unpredictable and dangerous." (Id. at p.893). Barker's motive was not "inexplicable" under this definition.

Similarly, the record does not indicate that Barker's motive was "very trivial in relationship to [his] offense." (§2281(c)(1)(E).) "The offense committed by most prisoners serving life terms is, of course, murder. Given the high value our society places upon life, there is no motive for unlawfully taking the life of another human being that could not reasonably be deemed 'trivial'. The Legislature has foreclosed that approach, however, by declaring that murderers with life sentences must 'normally' be given release dates when they approach their minimum eligible parole dates... (Scott I, 119 Cal.App.4th at p.893).

SELF-HELP BOOK-REPORTS

At page 40 of Exhibit "A"; "The panel strongly encourages you to look beyond urrent education process and look to forms of self-help", again at page nd the Panel would accept book reports, some sort of report, two or three

paragraphs...", also eloquently stated by the superior court: "...and his stubborn refusal to program as directed by the eligibility board..."

Although worded as an 'encouragement' to Petitioner it is only meant as another hoop to jump through for an excuse to bolster a predetermined denial without even taking the most basic steps to ensure that the prison library does in fact have self-help books available. Even if one could figure out how writing "two or three paragraphs" would make him a less danger to public safety regardless of the fact that the clinical psychologist made no such finding for self-help in his observations, defies common sense and logic.

A plethora of very recently issued California state and district court decisions uniformly holds that evidence of even particularly egregious facts of commitment offenses is not tantamount to evidence of undue current parole risk absent articulation of a nexus between those entities. Willis v. Kane, 485 F.Supp.2d 1126, 1135 (N.D. Cal. 2007) ["Notwithstanding the terrible nature of the crime, the critical question the BPH was supposed to decide at the parole suitability hearing was whether 'consideration of the public safety requires a more lengthy period of incarceration for this individual' ... Willis' 1983 crime did not provide sufficient evidence to find him unsuitable for parole in 2003"]; Martin v. Marshall, 431 F.Supp.2d 1038, 1049 (N.D. Cal. 2006); Blankenship v. Kane, 2007 WL 1113798 at *10 (N.D. Cal. 2007) ["...the California regulations require ... some evidence that the prisoner poses a present danger to society ... continued reliance over time on an unchanging factor ... the commitment offense ... does not provide evidence of a present danger to society"]; Thomas v. Brown, 2006 WL 3783555 at *6 (N.D. Cal. 2006) [not some evidence that the murder shows current parole unsuitability]; Rosenkrantz v. Marshall, 444 F.Supp.2d 1063, 1086 (C.D. Cal. 2006) ["the facts surrounding petitioner's crime no longer amount to 'some evidence' supporting the conclusion that petitioner would pose an unreasonable risk of danger if released on parole"]. State cases: In re Scott,

133 Cal.App.4th at 595 ["the commitment offense can negate suitability only if circumstances of the crime ... rationally indicate that the offender will present an unreasonable public safety risk if released from prison"]; In re Elkins, 144 Cal.App.4th at 496, 499 ["Thus, a governor, in reviewing a suitability determination, must remain focused not on circumstances that may be aggravating in the abstract but, rather, on facts indicating that release currently poses 'an unreasonable risk of danger to society"']; In re Lee, 143 Cal.App.4th at 1413 ["... the board and Governor must focus their parole decisions on whether a prisoner continues to pose an unreasonable risk to public safety ..."]; see also In re Lawrence, 150 Cal.App.4th 1511, 1554-1556 (2007); In re Gray, 151 Cal.App.4th 379 (2007); In re Barker, 151 Cal.App.4th 346, 375-377 (2007).

The Board deemed Petitioner unsuitable for parole (absent CLAIM NUMBER TWO) by reciting several of the sub-factors listed under Title 15 C.C.R. §2402(c)(1) describing the commitment offense as being "carried out in a manner that dispassionate (sic) and calculated", "The motive was inexplicable in relation to the offense."

These factors are sub-categories listed under the heading of a murder committed "in an especially heinous, atrocious, or cruel manner." (15 C.C.R. §2402(c)(1).) The Board copied the language from Cal. Penal Code §190.2, a "special circumstances" applicable only to particularly egregious first degree murders punishable by the "death penalty or life imprisonment without parole." Sub-section (a)(14) of the special circumstances statute, Cal. P.C. §190.2, reads, "the murder was especially heinous, atrocious, or cruel" which, the statute explains, means "manifesting exceptional depravity ... a conscious or pitiless crime that is unnecessarily tortuous to the victim."

Accordingly, the Board deemed Petitioner a current unreasonable risk to public safety by arbitrarily and capriciously characterizing his commitment offense as a premeditated special circumstance first-degree murder.

In Irons v. Carey, 479 F.3d 658 (2001), the Ninth Circuit's third in a trilogy that includes Biggs and Sass addressed the issue whether, consistent with due process, the immutable facts of commitment offenses may be employed repeatedly or interminably to preclude the parole of one like Petitioner who indisputably satisfies all parole requirements, has been psychologically evaluated to pose no parole risk and has served 28 years (inclusive of earned credits).

The court held that the BPH panel's use of Iron's crime, a particularly egregious murder, before he had served the minimum prison term imposed by the trial court, satisfied the "some evidence" test sufficiently to uphold the BPH panel's decision finding that Irons was unsuitable for parole. The court focused on Irons' egregious murder: he fired 12 rounds into the victim, then, when he found the victim was still alive, stabbed him twice. After leaving the corpse in a sleeping bag for 10 days, Irons removed and weighted it, and dropped it in the ocean.

The court emphasized that Irons, like Sass and Biggs before him, had not served "the minimum number of years to which they had been sentenced at the time of the challenged parole denial by the Board." The court explained, contrary to the Board's notion, why Biggs was not overturned by Sass, and re-emphasized that continued use of the commitment offense facts to find such an inmate unsuitable for parole may constitute a due process violation after the minimum term has been served:

> "We note that in all the cases in which we have held that a parole board's decision to deem a prisoner unsuitable for parole solely on the basis of his commitment offense comports with due process, the decision was made before the inmate had served the minimum number of years required by his sentence. Specifically, In Biggs, Sass, and here, the petitioners had not served the minimum number of years to which they had been sentenced at the time of the challenged parole denial by the Board. [] All we held in those cases and all we hold today, therefore, is that, given the particular circumstances of the offenses in these cases, due process was not violated when these prisoners were deemed unsuitable for parole prior to the expiration of their minimum terms." (Irons v. Carey, supra, at 664-665).

Under the Irons standard, at the time of Petitioner's 2006 parole hearing, his second, at age 65, he had served (including jail time and earned credits) twenty eight (28) years in prison, 11 years more than the minimum and at the maximum in the Matrix.

A district court recently elaborated on Iron's reasoning:

> "Another critical difference between this case and Biggs, Sass and Irons is that Brown has served a substantial amount of time beyond the minimum sentence. This court must consider that at some point after an inmate has served his minimum sentence the probative value of his commitment offense as an indicator of "unreasonable risk of danger to society" recedes below the "some evidence" required by due process to support a denial of parole. See, Irons, 479 F.3d at 665. A decision to revoke parole based solely on an inmate's commitment offense that can no longer be considered probative of dangerousness to society would be arbitrary and not comport with the "some evidence" standard. See Hill, 472 U.S. at 545-55, 457. This is one of those cases..."

The wording of "minimum term" is being mis-applied. Under California law an indeterminately sentenced inmate, like Petitioner, must be granted parole at his initial hearing or no later than at his first subsequent hearing at which his parole no longer poses an unreasonable risk of danger to public safety, Cal. P.C. §3041; 15 C.C.R. §§2401, 2402(a). The 'initial' hearing occurs one year before the inmate's minimum eligible parole date (MEPD) (Ibid.), "the earliest date on which an ISL or life prisoner may be legally released on parole" (15 C.C.R. §2000(b)(67)), which in Petitioner's case was August 30, 2003 (one year prior to the MEPD).

The Board appears to only take into consideration "earned credits" after the inmate is found suitable, then a date is calculated which is always far past. This act defies logic and common sense because the MEPD date is based on earned credits of 1/3rd time, i.e., Petitioner was sentenced to 25 years to life plus a 2 year gun enhancement, thus 27 years to life, less earned credits establish a minimum sentence of 18 years. (See Proposition 7 of 1978).

In, In re Ramirez, Marin County Superior Court, Case No. SC109829A (9-13-2000), (94 Cal.App.4th 549), the court held that parole could not be withheld

absent a factual finding that the offense was "particularly egregious."

To re-iterate a fact, Petitioner asserts that the Board's DECISION never even addressed the wording of "particularly egregious" and with the understanding of Ramirez, supra, that, reasonably interpreted, a factual finding of "particularly egregious" must be found to deny a parole date. See also, In re Rosenkrantz, 29 Cal.4th 616, 683, 128 Cal.Rptr.2d 104, 161 (2002)

PSYCHOLOGICAL EVALUATION

The facts at issue regarding the psychological evaluation are that the report is prepared by a state licensed, expert in his field, professional psychiatrist/psychologist with years of formal education and training with the ability to make sound judgments regarding an inmate's "potential" for "future violence" thus a threat or risk level assessment of current risk to public safety.

The Commissioners however have no such formal training, and none is established in Exhibit "A", or rather the lack of existence in the record that the Commissioners have a modicum of psychiatric knowledge or training, lacking professional credentials as a board certified expert or even at the level of knowledge required for a CDC Correctional Counselor as set forth in the Department of Corrections Operational Manual, at §62090.14.1 requiring staff to have at least two (2) years of "graduate training in psychiatrity" to make an evaluation for an inmate. When the Board over-rides or contravenes a Psychological Evaluation without "some evidence" to support their "re-evaluation" they are indeed practicing medicine without a license under California law.

The Psychological Evaluation Report is 'always' over-ridden and/or contradicted by the Board when the evaluation is favorable to an inmate for suitability of release on parole. The Board, nearly always, requires "selfhelp, book reports, AA, NA, and/or anger management in spite of what the Evaluation states or rather what is not recommended by the psychologist making the evaluation.

Exhibit "D", under 'XI': "If paroled, he plans to live with his sister and

collect Social Security. The prognosis for successful, responsible, legal, prosocial community is good." (Emphasis added).

At 'XII': "He exhibited no depressive or psychotic symptomatology. His intellectual functioning was estimated to be in the average range. He was calm, cooperative and alert. His mood affect and flow of thought were all normal. His insight and judgment were good. He is not currently in need of any mental health treatment."(Emphasis added).

At 'XIV': "...his violence potential is lower than the average citizen."

At 'XV': "He does not have a mental health disorder that would necessitate treatment either while incercerated or on parole." "There are no obvious mandatory conditions of parole and recommendations."

The Board cannot legally apply 15 C.C.R. §§2400-2411 to over-ride or control the legislative intent of Cal. P.C. §3041. See, Aerolineas Argentinas v. U.S., 77 F.3d 1564 (Fed. Cir. 1996).

When an administrative regulation conflicts with a statute, the statute controls. (Government Code §11342.2). Petitioner asserts that §§2400-2411 rules and regulations are in direct conflict with P.C.'s §3041 et seq., wherein §3041 only carries one basic requirement for a parole release date, i.e.,, consideration of public safety. Although the Board may use 'all' available information to arrive at their decision the intent of the penal code still controls and the Board cannot change, add to or delete the requirements for parole release suitability, an issue already decided (threat level assessment) by a state certified Psychiatrist.

An agencies regulations cannot legitimate the violations of constitutional or statutory rights. U.S. v. Marolf, 173 F.3d 1213 (9th Cir. 1999). No other excuses/reasons given by the Board for denial of suitability are legally valid.

The Board has effectively amended P.C. §3041(a)(b) and the legislative intent has been circumvented. Proposition 7, 1978, did not allow such amendment without voters approval. See, In re Oluwa, (1989) 207 Cal.App.3d 447.

UNCHANGABLE CIRCUMSTANCES

Greenholtz, supra, spoke in detail about the purpose of parole being rehabilitation and, most important, recognized that an inmate's record during confinement indicates whether release on parole is appropriate. Therefore, even in the absence of Ninth Circuit case law clarifying the scope of Biggs, Greenholtz is still compelling law.

The facts of the unchanged circumstances must indicate a present danger to the community if released, and this can only be assessed not in a vacuum, after four or five eligibility hearings, but counterpoised against the backdrop of prison events. Bair v. Folsom State Prison, 2005 WL 2219220, *12 n.3 (E.D. Cal. 2005), report and recommendation adopted by, 2005 WL 3081634 (E.D. Cal. 2005).

In Irons v. Warden of California State Prison-Solano, 358 F.Supp.2d 936, 947 (E.D. Cal. 2005) the court asks rhetorically:

> "What is it about the circumstances of petitioner's crime or motivation which are going to change? The answer is nothing. The circumstances of the crimes will always be what they were, and petitioner's motive for committing them will always be trivial. Petitioner has no hope for ever obtaining parole except perhaps that a panel in the future will arbitrarily hold that the circumstances were not that serious or the motive was more than trivial. Given that no one seriously contends lack of seriousness or lack of triviality at the present time, the potential for parole in this case is remote to the point of non-existence. Petitioner's liberty interest should not be determinad by such an arbitrary, remote possibility."

The court's holding that the Board's use of unchanging factors to deny parole is in violation of due process. Rosenkrantz v. Marshall, 444 F.Supp.2d, 1063 (C.D. Cal. 2006).

RECIDIVISM STUDIES

The purpose of this information is to bring to the court's attention of studies done several years ago regarding recidivism rates among inmates that the Board appears to ignore, given the no parole policy due to alleged threat or risk level to the public safety, always used by the Board and/or governor as excuses for parole suitability denials, at the current rate of 99% denials, I submit the

following information.

* * * * * * * * * * * * * * *

"Studies of parole success repeatedly indicate that those who commit murder are among the best parole risks." Allen, Eldridge and Latessa, Vito, Probation and Parole in America, p.254, 1985, citing Niethercut, 1972. Both with regard to the commission of felonies in general and the crime of homicide, no other offender has such a low rate of recidivism. Bedau, Hugo Adams, The Death Penalty in America, 3rd Ed., p.180, n.3, 1980. "Paroled murderers actually present some of the best parole risks." Bedau, Hugo Adams, The Death Penalty in America, 3rd Ed., p.180, n.3, 1980, citing NCCD newsletter, Uniform Parole Reports, 1972, p.2. "Compared with other groups, murderers are actually the best parole risks." Bedau, Hugo Adams, The Death Penalty in America, 3rd Ed., p.180, n.3, citing Stanton p.149, 1969. Two studies indicated that only three (3) in 10,000 and six (6) in 10,000 convicted of murder commit another crime. Bedau, Hugo Adams, The Death Penalty in America, 3rd Ed., pp.176-179, 1980. After conducting a study for the California Board of Prison Terms (1983-1987) it was concluded that no one released after committing a murder had been returned to prison for murder. Ellwood, Eldridge T., PH.D, Research Projects On Life Prisoners, p.3, April 1989, California BPT. "As a matter of statistical probability, murderers released from a prison are far less likely to commit a new crime than any other category of offender." Orland, Leonard, Justice, Punishment, Treatment, p.425, 1973. "Many murderers could be released immediately after conviction with little likelihood of offending again." Von Hirsh, Andrew, Doing Justice, Report On The Committee For The Study Of Incarceration, p.126, 1976. These authorities, from some of the most respected sociologists in our country, reveal the fallacy of assumptions regarding the dangerousness of those convicted of murder.

In reference to a murder case: Hending v. Smith, 781 F.2d 850 (11th Cir. 1986) ["[I]t is a matter of general knowledge that except for professional killers,

few people commit more than one murder in a life time. It is a crime involving a specific interpersonal crisis, and not a habitual offense."]; Rosenkrantz, 444 F.Supp.2d 1063, 2006 WL 2327085 at *12-17.

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STATE AND FEDERAL CLAIM NUMBER FIVE (V)

THE STATE OF CALIFORNIA HAS CREATED A MORE COMPREHENSIVE RIGHT FOR ITS RESIDENTS THAN THE FEDERAL GOVERNMENT FOR THE APPLICABLE EVIDENCE STANDARD APPLIED TO PAROLE SUITABILITY HEARINGS UNDER CALIFORNIA EVIDENCE CODE Sec. §115 HEREIN.

The Board of Prison Hearings has violated Petitioner's due process and equal protection rights under the Fourteenth Amendment of the U.S. Constitution, and, California Constitution Article I, Sec. 7(a), a right created by the Legislature of California and by its intent to create an evidence code (§115) that creates a minimal standard of 'evidence' requirement for all situations.

'Some evidence', as applied by the Board, and, used as a judicial tool to review the Board's decision for due process violations, is not the legal standard, especially under California law, see Evidence Code §115; also, U.S. Supreme Court precedents, herein asserted, establish that "preponderance of evidence" is the legal (minimum) evidence standard for parole suitability hearings and not the defunct 'some evidence' standard relied upon by either the Board, and/or Governor. Although the courts do rely on "some evidence" to determine if there is any evidence in the Board's denials (records) it must be "some evidence" that a "preponderance of evidence' exists in the record to support a denial.

The U.S. Supreme Court in Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633, 2651, 159 L.Ed.2d 578 (2004) stated that:

> "As the Government itself has recognized, we have utilized the "some evidence" standard in the past as a standard of review, not as a standard of proof."

The Court further explains that:

> "It primarily has been employed by courts in examining an administrative record developed after an adversarial process at least of the sort that we today hold is constitutionally mandated in the citizen enemy-combatant setting." See, e.g., Hill, 472 U.S., at 455457, 105 S.Ct. 2768.

The Hamdi court further explains that: "...for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty or property, without due process of law," U.S. Const. Amdt. 5, is the test that

we articulated in Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, (1976):

> "We agree with the prevailing view and conclude that Hill addressed only the appropriateness of 'some evidence' as a standard of appellate review, not as a standard of proof. Therefore, we now seek to determine through our own analysis the appropriate fact-finding standard to be used by the DOC. To determine whether a standard of proof in a particular type of proceeding satisfies due process, the Supreme Court has prescribed a three-factor test that examines: (1) the private interest affected, (2) the risk of erroneous deprivation of such interest, and (3) the government's interest."

In Carrillo, Supreme Court of Minnesota, 710 N.W.2d 763, 2005 Minn. LEXIS, 424, Filed July 28, 2005, that court relied on Eldridge and Hamdi and held that:

> "Taking the Supreme Court's three factors into consideration, we conclude that the "some evidence" standard is inappropriate for use by the DOC at the fact-finding level. We conclude that the "preponderance of evidence" standard better protects against an erroneous deprivation of an inmate's liberty interest in his supervised release date and does not pose an unacceptable burden on the DOC. Therefore, we conclude that a DOC hearing officer must find by a preponderance of evidence that Carrillo has committed a disciplinary offense before the commissioner can extend the date of his supervised release. Accordingly, we hold that the district court and the court of appeals erred when they denied Carrillo's petition for writ of habeas corpus."

The State of California, by Legislative intent, has conferred more, or a greater, evidence standard upon the Board, and Governor's review, (and judicial review), by making the 'minimum' evidence standard "preponderance of evidence", rather than that espoused in Hill, i.e., "some evidence". See also, Jurasek v. Utah State Hospital, 158 F.3d 506 (10th Cir. 1998), "The state may confer more comprehensive due process protection upon its citizens than does the federal government."

Petitioner contends that a reasonable understanding of the holding in Hamdi v. Rumsfeld, relied upon in Carrillo, supra, Eldridge, supra, is that a court will apply the "some evidence" standard to review records, of both the Board's and Governor's denials for suitability of parole, to see if there was proof under the "preponderance of evidence" standard mandated by California Evidence Code

Sec. §115, not, that the record of the Board's, or Governor's, denial of suitability, decision only requires "some evidence" of proof, as is always applied by the Board for denial, and, by the Governor for review.

Petitioner's due process rights were violated when the defunct minimally necessary evidence (some evidence) standard was applied in place of preponderance of evidence as is mandated by California Evidence Code section §115, second paragraph; "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."), and U.S. Supreme Court precedents herein listed.

Thus, the Hill, supra, "some evidence" standard is being applied to circumvent and over-ride the California Constitutions duly elected Legislatures intent to confer a greater due process protection upon its citizens when they enacted Evidence Code §115 (Preponderance of evidence as the minimal standard of proof or review) than does the federal courts Hill standard of "some evidence".

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CONCLUSION

It is established in the Psychological Evaluation that Petitioner is not a current threat or risk to public safety. There was no evidence either under the "some evidence" "modicum of evidence" or any other evidence standard to support the denial of suitability, nor was there any evidence to support the Board's requirement for book reports under the guise of self-help as a requisite to suitability.

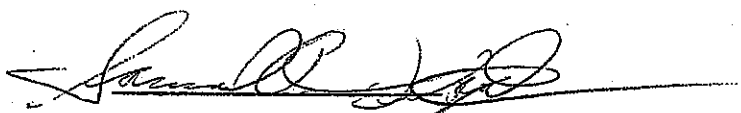
Petitioner was entitled to a term setting under his equal protection "class of one" claim at his first (initial) hearing.

The Board's predetermined denial was arbitrary and capricious and fails 'any' evidence test to support the denial.

Remanding Petitioner back to the Board for another pre-determined denial would be fruitless as is obvious to the courts that the Board does not follow direction or constructive criticism in various court orders, nor does the Board follow the intent of California Penal Codes and defies the California and U.S. Constitution with impunity.

The only alternative is for this court to issue and order to the Board to set Petitioner's release date as required by law. See, In re Scott, 133 Cal.App.4th at pp.603-604 [ordering immediate release instead of remand where no evidence supported denying parole].

Respectfully submitted,



10-30-07 Samuel A. Dubyak

PRAYER FOR RELIEF

Wherefore, Petitioner respectfully requests that this Court declare/order that:

1). Respondents show cause why Petitioner is not entitled to the relief requested:

2). The Board set a release date consistent with Title 15 C.C.R. 'Matrix' and as is established in P.C. §3041(a):

3). There was no evidence in the record to deny Petitioner a release date and/or uniform term setting after being found suitable and would not pose a risk to public safety:

4). The Board's denial of a release date was arbitrary and contrary to P.C. §3041(a)(b) language:

5). The Board set Petitioner's term as was done to Schiold and Rosenkrants (Claim No. III):

6). If the Board fails to set a parole release date and/or uniform term under Petitioner's Claims No. TWO and THREE, that this Court issue an order for Petitioner's release forthwith:

7). The Boards decision on October 24, 2006 became final 120 days after, per P.C. §3041(b):

8). Petitioner's release date and/or uniform term date become effective on October 24, 2006:

9). Grant Petitioner such other relief as this Court deems just and proper in the interest of justice as Petitioner is a layman at law.

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Samuel A. Dubyak D-54700
Box 689 C-115L
California State Prison
Soledad, CA 93960-0689

Petitioner, in pro se

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

SAMUEL A. DUBYAK, Petitioner, v. CURRY, Warden, Respondent.	Case No. _____ MOTION/REQUEST FOR JUDICIAL NOTICE

To: THE HONORABLE JUDGE(S) OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO.

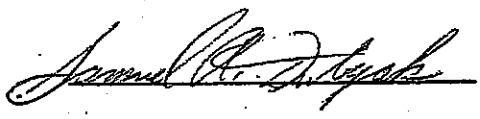
Pursuant to California Evidence Code sections 451 subdivision (a), 452 subdivision (a), (c) & (d), and 459 subdivision (a), Commode Home System, Inc. v. Superior Court, (1982) 32 Cal.3d 211, 218-219, and, Adamson v. Zipp, (1984) 163 Cal.App.3d Supp. 1, n.17, Petitioner hereby asks this Court to take "Judicial Notice" of the documents submitted and currently attached to the herein petition as the following listed exhibits: "A", Parole Board suitability hearing transcripts, "B" designated as "SETTLEMENT AGREEMENT, Re, Schiold, "C" designated as an order, Re, Rosenkrantz, "D" designated as Petitioner's Psychological Evaluation.

This Court must take Judicial Notice of the factual findings of other courts, and this court's previous orders, even though the Court need not accept the truth of those findings. See, Mack v. State Bar of California, (2001) 92 Cal.App.4th

957, 961, rehearing denied, review denied; Duggal v. G.E. Capitol Communications Service, Inc., (2000) 81 Cal.App.4th 81, 82; People v. Moore, (1997) 59 Cal.App.4th 168, 178.

Petitioner has obtained the above mentioned documents from the prison law library and from the Swedish Consulate's office, (through another inmate Petitioner assisted). All of the attached cases arose out of habeas corpus proceedings in the aforementioned Courts. Review of the attached cases will assist this Court in evaluating the claims presented in Petitioner's habeas corpus petition along with this MOTION/REQUEST FOR JUDICIAL NOTICE.

Respectfully submitted,



Samuel A. Dubyak

10-30-07

EXHIBIT

A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

In re

Samuel A. Dubyak

On Habeas Corpus.

Case No.: HC 5740

ORDER

On May 29, 2007, Petitioner Samuel A. Dubyak filed a petition for writ of habeas corpus. Petitioner is currently incarcerated at the Correctional Training Facility (CTF) in Soledad. Petitioner describes the background of the petition as follows.

On October 24, 2006, Petitioner's second parole suitability hearing was held. To date, Petitioner has not received a copy of the transcript from this hearing.

Pursuant to California Rules of Court, 4.551(b), the court requests an informal response from the Attorney General's Office (Respondent). The informal response should address when Petitioner will receive a copy of his parole suitability hearing transcript.

The informal response shall be filed within 15 days from the date of service of the order. Petitioner may file a reply within 15 days from the date of service of the informal response upon Petitioner.

IT IS SO ORDERED.

Dated: July 5, 2007

Hon. James W. Luther
Judge of the Superior Court

EDMUND G. BROWN JR.
Attorney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

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July 20, 2007

The Honorable James W. Luther
Monterey County Superior Court
P.O. Box 1051
Salinas, CA 93902-0414

RE: INFORMAL RESPONSE
In re SAMUEL A. DUBYAK, Case No. H5740

Dear Judge Luther:

This letter is written pursuant to the court's request for an informal response to inmate Samuel Dubyak's petition for writ of habeas corpus. Petitioner Dubyak is a California state inmate at the Correctional Training Facility (CTF) who alleges that he has not received a copy of the transcript from his parole consideration hearing held on October 24, 2006. (Petn.) Petitioner's claims, however, are moot.

As a general principle, it is the duty of a court to decide only "actual controversies" by judgments which can be carried into effect. Courts must avoid rendering opinions on moot questions, abstract propositions, or declaring rules of law which cannot affect a matter at issue in a pending case. (*National Association of Wine Bottlers v. Paul* (1969) 268 Cal.App.2d 741, 746.) "[A]lthough a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character, it becomes a moot case or questions which will not be decided by the court." (*Wilson v. Los Angeles County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453.)

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Attached to this informal response is a copy of Dubyak's October 24, 2006 parole consideration hearing. (Exh. 1 – Parole Consideration Hearing Transcript.) Given that Dubyak will receive a copy of this informal response and the attached exhibit upon service, he will have the parole consideration hearing transcript he requested. Because Dubyak already received the relief requested, this court can no longer grant relief and respondent requests the petition be dismissed.

Sincerely,

Stacey D. Schesser

STACEY D. SCHESSER
Deputy Attorney General
State Bar No. 245735

For EDMUND G. BROWN JR.
Attorney General

SDS:ls

Attachments: Exhibit 1

20096325.wpd

PROCEEDINGS

--oOo--

DEPUTY COMMISSIONER BLONIEN: We are on record.

PRESIDING COMMISSIONER DAVIS: This is a subsequent parole consideration hearing for Samuel Dubyak.

INMATE DUBYAK: Yes, sir.

PRESIDING COMMISSIONER DAVIS: Am I pronouncing that correctly?

INMATE DUBYAK: Yes, sir.

PRESIDING COMMISSIONER DAVIS: CDC number D-54700. Today is date is October 24, 2006 and we're located at CTF in Soledad. The inmate was received on April 23, 1987 from San Bernardino County. The life term beginning on April 23, 1987 with a minimum eligible parole date of August 31, 2004. The controlling offense for which the inmate has been committed is murder first with use of a firearm. Case number CR12056, count one Penal Codes Section 187/12022.5 for which he received a term of 25 years to life plus two. This hearing is being tape recorded so for the purpose of voice identification we'll each state our first and last name, spelling our last name. And when it reaches you Mr. Dubyak if you'll also give us your CDC number, please sir. I'll start and move to my left, I'm James Davis, D-A-V-I-S, Commissioner.

DEPUTY COMMISSIONER BLONIEN: I'm Noreen Blonien,

B-L-O-N-I-E-N, Deputy Commissioner.

DEPUTY DISTRICT ATTORNEY DAWSON: Jennifer Dawson, D-A-W-S-O-N, Deputy District Attorney, San Bernardino County.

ATTORNEY FERGUSON: Peter Ferguson, F-E-R-G-U-S-O-N, counsel for Mr. Dubyak.

INMATE DUBYAK: Samuel Dubyak, D-U-B-Y-A-K.

PRESIDING COMMISSIONER DAVIS: And your CDC number?

INMATE DUBYAK: Oh sorry, D-54700.

PRESIDING COMMISSIONER DAVIS: Very well thank you, and let the record reflect that we are joined today with two correctional officers who are here for security purposes and will not be actively participating in the hearing. Mr. Dubyak, in front of you in that laminated piece of paper is the American's with Disabilities Act, will you please read that aloud?

INMATE DUBYAK: "The Americans with Disabilities Act, ADA, is a law to help people with disabilities. Disabilities are problems that make it harder for some people to see, hear, breathe, talk, walk, learn, think, work or take care of themselves than it is for others. Nobody can be kept out of public places or activities because of disabilities. If you have a disability you have the right

to ask for help to get ready for your BPT Hearing, get to the hearing, talk, read forms and papers, and understand the hearing process. BPT will look at what you ask for to make sure that you have a disability that is covered by ADA, and that you have asked for the right kind of help. If you do not get help or if you don't think you got the kind of help you need, ask for a BPT Form 1074 grievance form, you can also get help to fill it out."

PRESIDING COMMISSIONER DAVIS: Very well, thank you. Our records indicate that on May 10, 2006 that together with staff at the institution on November 18, 2005 you reviewed and signed a BPT form 1073 indicating that you do not have any disabilities that would qualifying under the American's with Disabilities Act, is that correct?

INMATE DUBYAK: That is correct.

PRESIDING COMMISSIONER DAVIS: Has anything changed since that time?

INMATE DUBYAK: No.

PRESIDING COMMISSIONER DAVIS: And you were able to read that without glasses, do you normally need glasses?

INMATE DUBYAK: I'm blind in my right eye, that's

why I move it back and forth. I have glasses yes.

PRESIDING COMMISSIONER DAVIS: Okay but you were able to read it without them. But you do have glasses as an accommodation in the event that you need them?

INMATE DUBYAK: Yes.

PRESIDING COMMISSIONER DAVIS: And you had those when you read your C-File in preparation of this hearing?

INMATE DUBYAK: Yes.

PRESIDING COMMISSIONER DAVIS: And you can hear me all right?

INMATE DUBYAK: Yes.

PRESIDING COMMISSIONER DAVIS: And you made it up here under your own steam, you walked here all right?

INMATE DUBYAK: Yes.

PRESIDING COMMISSIONER DAVIS: Feel healthy and fit and ready to go?

INMATE DUBYAK: Ready.

PRESIDING COMMISSIONER DAVIS: Any reason that you can think of that you would not be able to actively participate in this hearing today?

INMATE DUBYAK: No.

PRESIDING COMMISSIONER DAVIS: I do see that you have some medical conditions including not lifting certain things, no climbing, no bending, stooping and so forth, some other medical conditions that did not interfere with you getting to the hearing?

INMATE DUBYAK: No, I'm careful when I climb

steps I try to make steps (inaudible).

PRESIDING COMMISSIONER DAVIS: So you have a cane as a partial accommodation as well. And you're able to make it up the steps all right.

INMATE DUBYAK: Yes.

PRESIDING COMMISSIONER DAVIS: All right. Counsel and you're satisfied with that as well?

ATTORNEY FERGUSON: Yes, sir.

PRESIDING COMMISSIONER DAVIS: This hearing is being conducted pursuant to Penal Code Section 3041 and 3042 of the Rules and Regulations of the Governing Board of Parole for life inmates. The purpose of today's hearing is to once again consider the number and nature of the crimes that you were committed, your prior criminal and social history, and your behavior and programming since your commitment. We've had the opportunity to review your Central File and your prior transcripts. And you'll be given the opportunity to correct or clarify the record as we proceed. Now we will reach a decision today and inform you whether or not we find you suitable for parole and the reasons for our decisions. If you are found suitable for parole the length of your confinement will be explained to you. Nothing that will happen here today will change the findings of the court. The Panel is not here to retry your case, we are here for the sole purpose of determining your suitability for parole, do you

understand that sir?

INMATE DUBYAK: Yes.

PRESIDING COMMISSIONER DAVIS: This hearing will be conducted in two phases. First I will discuss with you the crime that you were committed for, your prior criminal and social history. Commissioner Blonien will discuss with you your progress since your commitment, your counselor's report, and your psychological evaluation, your parole plans, and any letters of support or opposition as they may exist. Once that's concluded the Commissioners, the District Attorney, your attorney will have the opportunity to ask you questions. The questions that come from the District Attorney will asked through the Chair and you will respond back to the Panel with your answer. Following that the District Attorney, then your attorney will have an opportunity for a final closing statement. Which will be followed by your closing statement, which should focus on your suitability for parole. The California Code of Regulations states that regardless of time served an inmate shall be found unsuitable and denied if in the judgement of the Panel the inmate would pose an unreasonable risk of danger to society if released from prison. And you have certain rights those rights include a timely notice to the hearing, the right to review your Central File and the right to present relevant documents. Counsel are you satisfied that your client's rights have been met today?

ATTORNEY FERGUSON: Yes, we are.

PRESIDING COMMISSIONER DAVIS: You have an additional right to be heard by an impartial panel, you heard Commissioner Blonien and I introduce ourselves today, do you have any reason to believe that we would not be impartial?

INMATE DUBYAK: I have no knowledge of either of (inaudible).

PRESIDING COMMISSIONER DAVIS: You believe that we would be impartial?

INMATE DUBYAK: That you don't have anything against me.

PRESIDING COMMISSIONER DAVIS: All right, very well. You will receive a written copy of our tentative decision today, that decision becomes effective within 120 days and a copy of the decision and a copy of the transcript will be sent to you. The Board has eliminated it's appeal process, if you do disagree with anything in today's hearing you have the right to go directly to court with your appeal. Now you're not required to discuss your offense or admit your offense, however the Panel does accept the findings of the court as true. Do you understand that?

INMATE DUBYAK: Yes, sir.

PRESIDING COMMISSIONER DAVIS: All right, Commissioner Blonien, are we going to be using anything from a confidential file.

DEPUTY COMMISSIONER BLONIEN: There is nothing in a confidential file.

PRESIDING COMMISSIONER DAVIS: All right. I previously passed to both counsel a checklist counsel and district attorney the checklist of documents. Will you both take a look at that please, make sure that you both have those?

ATTORNEY FERGUSON: We've received the indicated documents.

DEPUTY DISTRICT ATTORNEY DAWSON: I have them all here.

PRESIDING COMMISSIONER DAVIS: Counsel, any additional documents?

ATTORNEY FERGUSON: Yes, Mr. Dubyak has very consciously put together a whole packet, which includes various documents as far as his plans go.

PRESIDING COMMISSIONER DAVIS: Good, thank you, we'll take a look at those at the appropriate time. Any preliminary objections?

ATTORNEY FERGUSON: None at this time.

PRESIDING COMMISSIONER DAVIS: All right, and will your client be speaking to us today?

ATTORNEY FERGUSON: Yes, and he will be stipulating to the official version of the facts.

PRESIDING COMMISSIONER DAVIS: All right, then. Is that you don't want to talk about the incident offense itself then, your just going to stipulate that? That way

we'll just avoid any questions regarding the incident offense. All right, if you'll raise your right hand then for all other matters. Do you solemnly swear or affirm that the testimony that you at to give at this hearing will be the truth and nothing but the truth?

INMATE DUBYAK: I do.

PRESIDING COMMISSIONER DAVIS: All right, without objection I'd like to incorporate reference the Court of Appeals document pages two through three. And refer to the Board report dated July 2003 for the summary of the crime, which states that,

"On August 27, 1985, Mr. Raul Rodriguez R-O-D-R-I-G-U-E-Z of Marovis, M-A-R-O-V-I-S, Puerto Rico, contact the police department regarding the disappearance of his sister, Lourdes L-O-U-R-D-E-S, Dubyak. The investigation was turned over to Detective Beckman, B-E-C-K-M-A-N, Mr. Rodriguez advised Detective Beckman that no one had seen or heard from Lourdes after the accident in 1985. Mr. Rodriguez further indicated that the victim kept in close contact with her family. In addition, Mr. Rodriguez indicated that had his sister left the area, she would have taken her two year old daughter Angelica, A-N-G-E-

L-I-C-A, Mr. Rodriguez had also advised Detective Beckman that he had been in contact with Lourdes' husband Samuel Dubyak, the defendant and had received inconsistent statements from him. He also advised Detective Beckman that he had called his sister at 9:00 p.m. Pacific Daylight time and was advised by Dubyak that she was not home. According to the information received from a neighbor the victim left her house between 8:15 and 8:30 p.m. and would have easily returned home prior the 9:00 p.m. telephone call. Mr. Rodriguez indicated that his sister and her husband have been having marital problems for a period of time and the victim had consulted with him regarding divorcing her husband. Mr. Rodriguez had further indicated that the victim had been having affairs with several individuals over the last several months, a fact that which the inmate was aware. Upon receiving this information, Detective Beckman started his own investigation about the whereabouts of Lourdes Dubyak. Detective Beckman was able to establish that on the weekend of

August 9th through August 11th, 1989, the victim spent time with her lover, Marcel Berasalece, B-E-R-A-S-A-L-E-C-E, in a motel. Mr. Berasalece dropped the victim off at her residence on August 11, 1985 in the early afternoon. The victim telephoned him later that afternoon and what was the last he heard of her. They made arrangements to have a lunch date on Tuesday, August 13, 1985, however the victim failed to keep her engagement. Detective Beckman interviewed Debbie Alongis, A-L-O-N-G-I-S, a close friend and neighbor of the victim. She indicated that she had last seen the victim on August 11, 1985 at approximately 8:00 p.m. the victim left her residence and was on her way home. That was the last Ms. Alongis ever saw the victim. However the following morning Dubyak arrived at Ms. Alongis' home and requested a videotape which had been loaned to her family. Mr. Dubyak advised Ms. Alongis that the victim had left him. On August 30, 1985 the inmate was interviewed by Detective Beckman after being advised his rights, Dubyak

advised that his wife, Lourdes, had left him on Sunday, August 11, 1985, between 9:00 and 9:30 p.m. he indicated that she made a telephone call dropped off the baby off in his room and said she had to go out for awhile. Mr. Dubyak assumed that the victim had taken her car. However upon waking in the morning he discovered that his wife had not left in the automobile. As the investigation continued Detective Beckman learned that Dubyaks slept in separate bedrooms and the bedroom that Mrs. Dubyak slept in had been converted into a television room. The double bed that Mrs. Dubyak slept in was currently gone. When Detective Beckman question Mr. Dubyak regarding this, he indicated that the victim must have taken this as he had no idea where the bed was. The investigation of Lourdes Dubyak continued, Detective Beckman learned that on August 16, 1985 the inmate and his brother, Peter Dubyak, along with a 13 year old juvenile from the neighborhood had loaded a bed from Dubyak's house into a truck. And subsequently and had dumped it on the

side of the road, east of Ontario International Airport. On November 5, 1985, that bed was discovered approximately 200 yards east of Vineyard Street in Ontario. The bed was subsequently identified by family members and neighbors as the bed, which was originally in the victim's bedroom. On November 6, 1985 the mattress, box springs, and headboard were preliminary examined by a San Francisco crime laboratory. Tests for traces of human blood were conducted negative results, however during the examination two holes were found to have been cut in the foam part of the mattress. The complete examination of the bed was completed on November 8, 985, at which time a projectile exit hole was located on the underside of the mattress. The projectile exit hole was found in the box spring of the mattress. The projectiles were later determined to be made from a .22 caliber long rifle with gold-jacketed bullet. After presenting the above information, Detective Beckman obtained an arrest warrant for the inmate and his

brother Peter Dubyak for investigation of murder. On December 2, 1985 a search warrant was executed at 12248 Kumquat, K-U-M-Q-U-A-T, Street. On that date a luminol, L-U-M-I-N-O-L, reagent test was conducted by San Bernardino County Criminalistics Laboratory. The test was made in an attempt to locate traces of blood in the residence. When the luminol reagent was applied in the bedroom in which the bed had been, traces of bloodstains were located in the wall near the headboard of the bed around the light switch and on the carpet itself. In addition, bloodstains were also located on the carpet of the hallway leading up to the laundry room and the garage. Additionally, the presence of blood was located in the rear hatchback of the vehicle belonging to Dubyak. In addition, several hundred rounds of Remmington .22 caliber ammunition were recovered from the residence. Although the inmate was arrested on December 2, 1985, charges were not filed and he was subsequently released on December 4, 1985. At that point the investigation

continued, at that point the additional information was obtained continued to indicate that Samuel Dubyak was responsible for the disappearance and probable death of Lordes Dubyak. Checks of the victim's charged card revealed that no charges had been made during that time and there had been no activity on the part of the victim on a joint checking account. During the time it had been established that Dubyak had reported to work on Monday August 12, 1985. However after being there approximately 45 minutes, he had left ill. Dubyak subsequently returned to work the following day, during that time the investigation continued as to the whereabouts of the victim and other evidence was obtained from additional witnesses. On March 3, 1986 Dubyak contacted Vivian Almovodar, A-L-M-O-V-O-D-A-R, the victim's aunt. The inmate showed the Mrs. Almovodar a letter which he said had been received on March 1, 1986, Mrs. Almovodar indicated that the letter was typed, however the letter was signed by the victim, Lourdes.

The letter was subsequently obtained by Chino Police Department on April 1986, however tests from the Federal Bureau of Investigations indicated that the signature of "Lourdes" had been traced from another signature. On September 3, 1986, after almost 13 months of investigation the inmate was again arrested for the murder of Lourdes Dubyak. On November 12, 1986 criminal information was filed in the West District Superior Court by Deputy District Attorney Robert Guizzino, G-U-I-Z-Z-I-N-O, accusing the defendant of murder in violation of Penal Code Section 187, an additional allegations that the defendant used a firearm pursant to Penal Code Section 12022.5. On February 26, 1987 after deliberating less than six hours the jury found the defendant guilty of murder in the first degree with enhancement of use of a firearm."

And this was all from the probation officer's report. And as always counsel if your client would like to he certainly welcome to address the Board however we understand that he has an absolute right not to and that

will not be held against him. Under prisoner's version in the same report it does state that on March 9, 1987 the inmate was interviewed that the San Bernardino County Jail. Mr. Dubyak assisted in completing the face sheet of the probation report, however indicated that on the advice of an attorney he did not wish to discuss the matter with the undersigned officer related that he anticipates his conviction to be appealed. He did state however to the undersigned officer "I am innocent." Mr. Dubyak was aware that he would be sentenced to state prison on the matter however requested the clerk postpone his delivery to the Department of Corrections until after April of 1987. And it goes on to that's really to some exception of the statement. In terms of prior arrests, we note that in terms of the juvenile record you have a record 6/4/1987 from Los Angeles Police Department had one arrest for suspicion of burglary. There was no disposition available. And that the commitment offense was the only adult offense for Mr. Dubyak. Is that correct sir?

INMATE DUBYAK: There was no disposition; there was a trial on 19th of December.

PRESIDING COMMISSIONER DAVIS: And what happened as a result of that?

INMATE DUBYAK: Does that say '87?

PRESIDING COMMISSIONER DAVIS: Oh that's the record from 1987, on 3/11/1957 was the burglary arrest.

Was there a trial for that?

INMATE DUBYAK: No.

PRESIDING COMMISSIONER DAVIS: Okay.

INMATE DUBYAK: (Inaudible).

PRESIDING COMMISSIONER DAVIS: Oh, it was in 1957. But no adult arrests other than the commitment offense, is that correct sir?

INMATE DUBYAK: Correct. (Inaudible)

PRESIDING COMMISSIONER DAVIS: Okay.

INMATE DUBYAK: There was an arrest in either 68 or 69when I worked at a grocery store. There was a child and I (inaudible).

PRESIDING COMMISSIONER DAVIS: What was the crime that you were accused of?

INMATE DUBYAK: I seen him liquored up at the store and I had sold him my car and I needed registration and I didn't change the registration and (inaudible). The car was impounded the next day.

PRESIDING COMMISSIONER DAVIS: You had nothing to do with it whatsoever. Okay.

INMATE DUBYAK: But I got arrested for it.

PRESIDING COMMISSIONER DAVIS: So you were born in Pennsylvania.

INMATE DUBYAK: Yes, sir.

PRESIDING COMMISSIONER DAVIS: The middle child of three siblings, the family moved to California, you settle in Los Angeles. Attended Washington High School

from 1958 to 1960. And attended the Northrop Institute from 63-64, what's the Northrop Institute?

INMATE DUBYAK: That's aircraft technology, aircraft engineering.

PRESIDING COMMISSIONER DAVIS: And what did you learn to do there?

INMATE DUBYAK: I did some engineering and I did some aircraft (inaudible).

PRESIDING COMMISSIONER DAVIS: In '66-'67 you attended Rose School of Aviation in Hawthorne as a commercial pilot, so you were a commercial pilot at one time?

INMATE DUBYAK: Yes, sir.

PRESIDING COMMISSIONER DAVIS: And for whom did you fly?

INMATE DUBYAK: Just Rose Aviation and (inaudible).

PRESIDING COMMISSIONER DAVIS: So you were flying what, private?

INMATE DUBYAK: Yes, private and air tours.

PRESIDING COMMISSIONER DAVIS: In terms of employment history you worked for Ethic Manufacturing in Los Angeles as a foreman from 72-77. And is it Andal Corporation,

INMATE DUBYAK: A-M-D-A-L

PRESIDING COMMISSIONER DAVIS: Oh, it's A-M, Amdal Corporation in Marina Del Rey. As a production

planner from 77-82 and Hughes Helicopters in Culver City as a production analyst from 82-86. You were in the United States Marine Corp from 1960-63, and honorable discharge. What was your rank at discharge?

INMATE DUBYAK: Lance Corporal ~~E-trade~~ E-3 S.D.

PRESIDING COMMISSIONER DAVIS: You previously married a Virginia Chicon?

INMATE DUBYAK: Chicon.

PRESIDING COMMISSIONER DAVIS: In 1973, oh the marriage ended in divorce in 73 or 75?

INMATE DUBYAK: I think it was 73 or 72.

PRESIDING COMMISSIONER DAVIS: It says you have a five children, is that from the first marriage?

INMATE DUBYAK: Four in the first marriage and the fifth one in the second marriage.

PRESIDING COMMISSIONER DAVIS: Do you keep in contact with your children?

INMATE DUBYAK: Yes, I do.

PRESIDING COMMISSIONER DAVIS: All of them?

INMATE DUBYAK: Yes, I do.

PRESIDING COMMISSIONER DAVIS: Including the one from the second marriage?

INMATE DUBYAK: Yes.

PRESIDING COMMISSIONER DAVIS: And how do you, cards and letters so forth.

INMATE DUBYAK: We started writing and I found (inaudible) I started writing and she responded back and

I was able to make a few telephone calls and (inaudible).

PRESIDING COMMISSIONER DAVIS: And now when you say she, it's the daughter of Lourdes?

INMATE DUBYAK: Lourdes.

PRESIDING COMMISSIONER DAVIS: Lourdes and your daughter. During the interview of 4/3/03 (inaudible) married in Costa Rica and were divorced in Torrence California, not in Las Vegas, Nevada, as stated in the P.O.R, Dubyak and Lourdes, the victim were married on the Queen Mary in the Long Beach Harbor in 1981.

INMATE DUBYAK: Correct.

PRESIDING COMMISSIONER DAVIS: Let me know if there is an error at some point in time. Anything else about your life prior to the incident offense itself or your prior arrest record or anything else you want to clarify or add any detail to?

INMATE DUBYAK: No.

PRESIDING COMMISSIONER DAVIS: All right, if you think of something as we move along, please don't hesitate say wait a minute I remember one of those things. Questions?

ATTORNEY FERGUSON: None.

PRESIDING COMMISSIONER DAVIS: All right, then I'll ask you to move your attention over to Commissioner Blonien.

DEPUTY COMMISSIONER BLONIEN: Mr. Dubyak, this is your first subsequent hearing and your last appearance

before the Board was September 2, 2003. And the Panel decision was a three year denial, the Panel recommended that you become and remain disciplinary free and you participate in self help. Specific recommendation was to participate in anger management. Your custody level is medium A, your classification score is 19, which is the lowest possible for a lifer inmate. So in order to do this report, I read the Board Report, prepared by your counselor, Berdsoto, B-E-R-D-S-O-T-O, dated June 30 of 2006. I read the new psych report by Dr. Merek, M-E-R-E-K, dated Septemeber of '06. I've gone through your C-File and I see that you did an Olsen review of your C-File on May 10 of '06. Correct?

INMATE DUBYAK: Correct.

DEPUTY COMMISSIONER BLONIEN: And I've gone through the whole Board packet. So since you've been in the institution you've only had one 115 in 1994 and that was for manipulating the mail process. You had one 128 in 1999 for a physical, a very minor physical altercation. At your last hearing they asked you about your high school diploma, that wasn't in your C-file, it is now in your C-File. You graduated in June 1, 1960, correct?

INMATE DUBYAK: Correct.

DEPUTY COMMISSIONER BLONIEN: And you've taken several college courses in Political Science, Accounting, Real Estate, Spanish, you completed Spanish course in

2000 and 2001. You completed the Real Estate course in November of 2005 and you're currently taking the Accounting course, right?

INMATE DUBYAK: I just finished the Accounting course (inaudible) two, three, four months ago.

DEPUTY COMMISSIONER BLONIEN: What grade did you get?

INMATE DUBYAK: I'm waiting for my results.

DEPUTY COMMISSIONER BLONIEN: Well you do well in the courses that you take, I saw that. And you also have a Bachelor of Science from Embry-Riddle Aeronautic University in Aviation Technology. And you got that in 2001. I was compiling a lot of my grades in my downtime and my previous aeronautic experience.

DEPUTY COMMISSIONER BLONIEN: So that must have taken you quite a bit of time to put that together.

INMATE DUBYAK: Well I've been flying for 49 years, I've got quite a few hours on my commercial (inaudible).

DEPUTY COMMISSIONER BLONIEN: So where is Embry-Riddle Aeronautic University?

INMATE DUBYAK: They have one in San Francisco, I think in Florida.

DEPUTY COMMISSIONER BLONIEN: So you put together a packet of the courses that you've taken and your flying time and you submitted that to them.

INMATE DUBYAK: And some other different

(inaudible), just a minute.

DEPUTY COMMISSIONER BLONIEN: Okay, do you need water?

INMATE DUBYAK: I just took some pills before (inaudible).

DEPUTY COMMISSIONER BLONIEN: You need a minute.

INMATE DUBYAK: No, a little dry mouth as I expected to get. I got some help from a person on the outside that got some of my past history together (inaudible). My flight time.

DEPUTY COMMISSIONER BLONIEN: Do you want to take a break just for five minutes?

ATTORNEY FERGUSON: Just some water.

INMATE DUBYAK: I don't want to pass out.

DEPUTY COMMISSIONER BLONIEN: We don't want you to do that. Well we got you in a very stable chair. Well let's just go off for a minute, let him drink his water?

PRESIDING COMMISSIONER DAVIS: Sure.

(OFF RECORD)

DEPUTY COMMISSIONER BLONIEN: Okay, you were telling me about how you put together this packet.

INMATE DUBYAK: I put together my flight time and total aviation administration, my commercial pilot's license. And through my flight hours and my education and my other credits, I was entitled to a degree from the school.

DEPUTY COMMISSIONER BLONIEN: And in talking with your counselor, your psychologist, you study different legal issues also related to your case?

INMATE DUBYAK: Yes, I studied different languages, French and Spanish.

DEPUTY COMMISSIONER BLONIEN: I saw all the Spanish, I didn't see the French. How much French did you have?

INMATE DUBYAK: I have to take a course and quite frankly the rules (inaudible) I can't recognize words and memorize (inaudible).

DEPUTY COMMISSIONER BLONIEN: It's different than Spanish and English. You worked as a ~~Wayne~~ WING porter.

INMATE DUBYAK: Yes.

DEPUTY COMMISSIONER BLONIEN: Although your supervisor evaluations, I couldn't find one after 03 and they were totally satisfactory. But I didn't see a current one.

INMATE DUBYAK: (Inaudible).

DEPUTY COMMISSIONER BLONIEN: I'm not sure either, I do see that. You were assigned there. In terms of -- well the big question. The last Panel was pretty specific in recommending that you participate in self-help therapy and specificity in anger management and anger control. And I don't see anything in that arena, are you reading a book in that area?

INMATE DUBYAK: No, but I invest about two or

three hours a day in anger management. Walking out on the wing, going to the yard and people have no idea what you have to deal with in here and in the get into the shower and have to wait for other people who are shooting up drugs. And sitting down by your table and they're getting and yelling in your ears, while you're trying to hold a conversation. I'm getting to go through more anger management in the general population then any class is going to get me. (Inaudible).

DEPUTY COMMISSIONER BLONIEN: There are different ways to approach anger control and anger management. In what you're just talking about is a possible way. But you and I having a conversation about it is not the same as presenting documentation that you've given it some thought. That you've been introspective about your past life and decisions that you made there. And how critical thinking is bringing you a way from an angry response now. And if you'll just document it, what you're doing in that arena, the Board accepts self-help in terms of self-study. In terms of we talked about education, we talked about work, we talked about (inaudible) since '94. When I look at your psych report by Dr. Merek, he talks a lot about your education history and gives you no diagnosis under anything wrong under Axis I or Axis II. He notes that your many physical issues and gives you a Global Assessment Functioning Score of 80. So there was never any alcohol or drug abuse in your history.

INMATE DUBYAK: I never used drugs in my life. I maybe drink once a month (inaudible). That's been my (inaudible) since I've been 24-25 years old.

DEPUTY COMMISSIONER BLONIEN: It's sort of unusual with a military history.

INMATE DUBYAK: Yes.

DEPUTY COMMISSIONER BLONIEN: You sort of see a lot of people with military history, and for some reason drinking issues. How did you stay out of that?

INMATE DUBYAK: I entered the Marine Corps when I was 17 years old. (Inaudible) and when I came out of high school I was, I don't want to use the word naïve, I was a country boy and I just never drank, never really cared for it. I took a drink one time in the Marine Corps when they have what they call a Beer ~~Buzz~~ Bust parties out in the desert someplace, I always drunk a can of Coke or something, just never got into it.

DEPUTY COMMISSIONER BLONIEN: I know once a Marine always a Marine, when did you get out of the Marine Corps.

INMATE DUBYAK: I guess I'm not out. I got out in '63.

DEPUTY COMMISSIONER BLONIEN: And how come you didn't pursue your flying?

INMATE DUBYAK: When I went in at 17, at the time I had a 144 IQ so they waived the college requirement on me. I was supposed to go right into the (inaudible) program, but because I was 17 they said I couldn't get

into the program until I was 18. And that was six to nine months down the road. When I became 18 I needed to reenlist and I was short of time the way they did the program and I just didn't care the way they did the (inaudible).

DEPUTY COMMISSIONER BLONIEN: So you pursued that interest on the private sector. In talking about your assessment of dangerousness, the doctor said in a controlled setting your violence potential is lower than that of an average inmate, you only received the one 115 and one custodial chrono. But if released to the community your violence potential is lower than that of the average citizen. You spent most of your life being responsible and the incident offense is the only adult conviction. He is indeed guilty of the current offense, it doesn't seem likely that he would commit murder again. Since he does not have a life pattern of violence, the only apparent risk factor a precursor to violence would be to some how revisit the same sort of marriage scenario that you had with your second wife and not seeing where this could lead. It would seem based on his history of responsible behavior, good institutional behavior, efforts as self improvement, intelligence and an external desire to not return to prison, that he would be able to extricate himself from this predicament before it got worse. He's confident and responsible for his behavior and has the capacity to abide by institutional standards

and has primarily done so during his incarceration. He does not have a mental health disorder and that would necessitate treatment while incarcerated or on parole. There's no obvious mandatory conditions or recommendations. Parole decisions should be based on custody factors. So with that I am going to return to the chair.

PRESIDING COMMISSIONER DAVIS: Can you explain the 115 in 1994?

DEPUTY COMMISSIONER BLONIEN: The mail?

PRESIDING COMMISSIONER DAVIS: Yep.

INMATE DUBYAK: I used to do legal work for inmates. And this one inmate used to hassle with his staff and his mail getting out. And I didn't a service for him, it was my address on the outside of the envelope. (Inaudible). But I was nonetheless given the 115.

DEPUTY COMMISSIONER BLONIEN: The other thing that I didn't say that I should have said that you also sit with other inmates and help them with their reading. And I think that's pretty important. Oh and I didn't talk to you about your parole plans and you made this wonderful packet here. That you plan to reside with your sister, you have a type written letter from your sister dated 6/22/06, her name is Delores Warwick, W-A-R-W-I-C-K, and that you are welcome to live with her, that you have her support and the support of your daughters that will help you reintegrate back into society in a positive way. That

she knows you'll be applying for social security. She also knows about your physical issues, she also knows about your education and that you've received while you're in the institution. I don't recommend you become a day trader, I think that would be pretty amazing.

INMATE DUBYAK: I'm talking about day trading on the computer, I used to play stocks a few years ago.

DEPUTY COMMISSIONER BLONIEN: It's going well right now. You also have your estimated social security benefits, which would be $875 a month at 62, and if you wait until your full retirement which is 65 and four months you'll get 1148, you also probably eligible for disability, SSI. And you have the application that you filled out for that. You have a letter from the Federal Aviator Administration on 10/11, the date's a little blurred here talking about your commercial license certification, wanted a copy of that, and correspondence dealing with that issue. A letter from your counsel to the Federal Aviation Administration talking about your lack of participation in drugs or alcohol while incarcerated. Talking about your entrepreneurship class. So you live with your sister, you get social security, and then you continue your education and use your education to succeed in the area of stocks and you visit your children when you have permission of your parole agent. And your sister lives in ~~Pomona~~ Ripon California. Where's that?

INMATE DUBYAK: It's about 80 miles down the road

a little.

DEPUTY COMMISSIONER BLONIEN: Does she come visit you?

INMATE DUBYAK: No. Basically I've been permitted to visit since I've been here (inaudible).

DEPUTY COMMISSIONER BLONIEN: We also sent out 3042 notices to law enforcement, victim next of kin, and although I don't get any written letters in response, the District Attorney from San Bernardino is here and at the appropriate time she'll be allowed to make her comments on the record. So anything else I missed that we haven't talked about in terms of what you've been doing in the institution?

INMATE DUBYAK: Apparently I'm waiting for, there's only about 12 to 14 courses that I can get at. I'm waiting for business math, a business law course (inaudible).

DEPUTY COMMISSIONER BLONIEN: How do you pay for these courses?

INMATE DUBYAK: These ones are free.

DEPUTY COMMISSIONER BLONIEN: Does anyone on the outside send you any money?

INMATE DUBYAK: Occasionally my daughter and my sister send me something, my sister sends me a quarter package, a package every quarter. My daughter in Washington DC (inaudible). And the Spanish course I had a former girlfriend holding $2 that I had because she bought

a Spanish course years ago and it cost something like $386, (inaudible).

DEPUTY COMMISSIONER BLONIEN: And have you ever thought about going to a self-help course. Are you on any waiting list or anything?

INMATE DUBYAK: Honestly, I'm not (inaudible) I have problems sitting and problems standing. I have real bad problems with drug addicts and alcoholics (inaudible).

DEPUTY COMMISSIONER BLONIEN: There's a lot of drug addicts out in society now.

INMATE DUBYAK: Yeah.

DEPUTY COMMISSIONER BLONIEN: And the world's gone (inaudible).

INMATE DUBYAK: It's just, it's just not my thing.

DEPUTY COMMISSIONER BLONIEN: I'll turn back to the chair.

PRESIDING COMMISSIONER DAVIS: All right thank you. Any of the -- with your disability you do quite a bit of sitting, so how are you able to complete that given the limitations that you have.

INMATE DUBYAK: I take about five semester credits a month and between (inaudible).

PRESIDING COMMISSIONER DAVIS: I mean in terms of your sitting and reading.

INMATE DUBYAK: I either take a book out to the yard with me or I do one chapter and then I got my answers (inaudible).

SUBSEQUENT PAROLE CONSIDERATION HEARING

STATE OF CALIFORNIA

BOARD OF PAROLE HEARINGS

In the matter of the Life Term Parole Consideration Hearing of:

SAMUEL DUBYAK

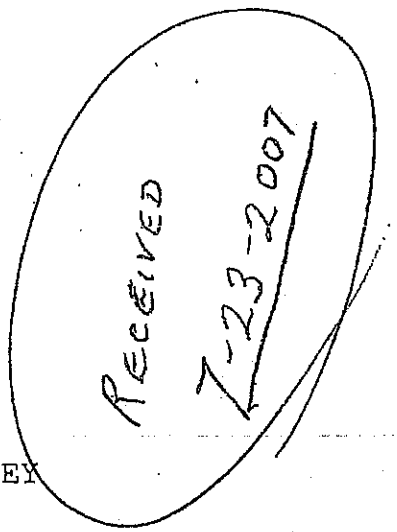
CDC Number D-54700

CORRECTIONAL TRAINING FACILITY

SOLEDAD, CALIFORNIA

OCTOBER 24, 2006

1:30 P.M.



PANEL PRESENT:
JAMES DAVIS, PRESIDING COMMISSIONER
NOREEN BLONIEN, DEPUTY COMMISSIONER

OTHERS PRESENT:

SAMUEL DUBYAK, INMATE
PETER FERGUSON, ATTORNEY FOR INMATE
JENNIFER DAWSON, DEPUTY DISTRICT ATTORNEY

CORRECTIONS TO THE DECISION HAVE BEEN MADE

_____ No
_____ Yes

See Review of Hearing Transcript Memorandum

INDEX

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PRESIDING COMMISSIONER DAVIS: And have you thought about using any of the self-help books in the same way?

INMATE DUBYAK: Honestly no. Not that I haven't thought about it, I just haven't looked at it.

PRESIDING COMMISSIONER DAVIS: Do you know that the last Panel told you was important?

INMATE DUBYAK: I just didn't feel like I had an anger management problem, I wasn't an alcoholic, I just couldn't see --

PRESIDING COMMISSIONER DAVIS: I'm talking about self-help, not AA or anything like that.

INMATE DUBYAK: Oh I thought self-help was more toward me furthering my education and guidelines.

PRESIDING COMMISSIONER DAVIS: That's self-help as well but it doesn't get to the more specific issue of anger management and so forth. But you described what you were doing. I don't have any questions, Commissioner do you?

DEPUTY COMMISSIONER BLONIEN: No, I don't.

PRESIDING COMMISSIONER DAVIS: Does the District Attorney have questions?

DEPUTY DISTRICT ATTORNEY DAWSON: No, sir.

PRESIDING COMMISSIONER DAVIS: All right, Counsel

ATTORNEY FERGUSON: I have no questions.

PRESIDING COMMISSIONER DAVIS: All right, closing?

DEPUTY DISTRICT ATTORNEY DAWSON: Thank you,

although the Board has already touched on it, I believe that the previous Board in no uncertain terms explained that they wanted him to participate in self-help in dealing with this situation. He claims that he is not an angry person yet there was indication that his wife was having an affair and that she was murdered. I find the doctor's statement on his second to last page, that he is indeed guilty of the current offense. I think that is an obscene statement for the doctor to put in his report considering this man was found guilty by a jury and through the appeals process continues to be found guilty. Obviously he has an anger problem, he has a low tolerance for quite a few people. He obviously had an episode with his wife. He not only killed her, her body's never been found. He tried to destroy all of the evidence that would link him to that murder. He is an intelligent man, who used his intelligence for that. However the forensics were a little bit better than he was. He is still a danger. There has been no insight into anything. The Distirct Attorney's Office of San Bernardino would ask the Board at this time to deny parole date at this time.

PRESIDING COMMISSIONER DAVIS: All right, thank you. Counselor?

ATTORNEY FERGUSON: Yes, thank you. Much has been said here about anger management and self-help. This kind of institution is a pretty volatile place and I think we're all aware of that, there's conflictual situations

that come up on a daily if not hourly basis for somebody in Mr. Dubyak's position. He's been remarkably been able to deal with those situation and deflect any kind of conflict that has come his way over these many years. There must have been dozens, scores, untold numbers of occasions wherein Mr. Dubyak had to turn the other cheek, extricate himself from somebody coming at him in a physical manner. Given the fact that he has had zero incidents of any kind of violence within the institution. Really any disciplinary history of any nature whatsoever, I think speaks volumes of the fact that he is not a violent person. In fact he's quite adaptive in avoiding violence. That's born out by the lack of any 115s, other than the single one so many years ago. Wherein he was accused of circumventing the mail procedures. Otherwise, as the doctor pointed out he has been an excellent prisoner. And the Board back in 03 acknowledged that as well. But in any event, the self-help has benefit for some people clearly, somebody that needs or has AA or NA, people who are involved in conflictual. (tape turned over)

DEPUTY COMMISSIONER BLONIEN: Side two.

ATTORNEY FERGUSON: And it's not that Mr. Dubyak is the type of inmate that is just killing time. He keeps himself busy, clearly. He studies languages, reads a lot, has channeled his energy into constructive manners and with regards to the things that he's accomplished. Other

than the life crime, Mr. Dubyak really has no other history. It's the mission of this Board to determine if Mr. Dubyak presents an unreasonable risk of danger to be released into free society. And on that count it's not only his lack of problems within the institutional setting, but is also underscored by the doctor's assessment of dangerousness. Wherein Dr. Merek indicates that while in a controlled setting his violence potential is lower than that of the average inmate, he too acknowledges the fact that there's only been the one 115. And further more if released to the community his violence potential is lower than the average citizen. Lower than the average citizen. Not the same as the average citizen, but lower than the average citizen. And the doctor acknowledges that he doesn't have the pattern of violence, the only apparent significant risk factor and precursor to violence would be if some how revisiting the same sort of marital scenario he had with his second wife and not see where this could lead. And it would be seem based on his history of responsible behavior and institutional adjustment efforts in self-improvement and intelligence in external desire to not return to prison that he would be able to extricate himself from this predicament before it got worse. To me that's a complete endorsement of Mr. Dubyak's readiness for parole. That coupled with the fact that he does have family, his sister in ~~Pomona~~ ONTARIO who has a place for him to go to. The residence situation is taken

care of. He has provided the Board with a well thought out packet of information wherein he has established that he has the financial resources in terms of Social Security and that can also be enhanced with disability payments which he would seemingly be entitled to. So for all these reasons, we would urge the Board to find Mr. Dubyak suitable because we believe strongly that has a (inaudible). And with that we'll submit.

PRESIDING COMMISSIONER DAVIS: All right, thank you. Mr. Dubyak it is now your opportunity to address the Panel directly regarding your suitability for parole. You've been sitting here now for a little bit I know you have some difficulty sitting and so forth for longer periods of time, do you need a break before you start?

INMATE DUBYAK: No.

PRESIDING COMMISSIONER DAVIS: Okay.

INMATE DUBYAK: Well, I would like to say that my understanding of, that my furthering my education it was more on the self-help basis. That I believe I don't have an anger management problem. But the Board does see that I have an anger management problem twenty years ago. The incident that I was convicted of twenty years ago is appropriate for today statement that I had an anger management problem. I've done, I've kept myself clean. I've never had any alcohol or drug problems in here that I've seen more drugs in here than I see on the outside. I'm not a violent person, most people see a violent crime

that (inaudible) conviction. So that was 21 years in the past, I am 64 years old. Deputy District Attorney stated that the forensics were better than me, that is not the case.

PRESIDING COMMISSIONER DAVIS: Mr. Dubyak, I would like you to confine yourself to your suitability for parole. Not answering what the District Attorney said.

INMATE DUBYAK: I plan on furthering my education on the outside (inaudible) paralegal of course. I've educated myself since high school and never stopped. I've never had any problems in high school or (inaudible). There is no reason in my mind for denial. If I need more (inaudible) or I need self-help I can still legally get a date. (Inaudible). That's all I don't know what else to say. (Inaudible). Thanks and I don't know what else to say.

PRESIDING COMMISSIONER DAVIS: All right. Thank you very much. We'll now recess for deliberations.

R E C E S S

CALIFORNIA BOARD OF PAROLE HEARINGS

DECISION

DEPUTY COMMISSIONER BLONIEN: We are on record.

PRESIDING COMMISSIONER DAVIS: All right, let the record reflect that all those previously identified as being in the room have returned. This is in the matter of Samuel Dubyak, CDC number D-54700. The panel the panel reviewed all the information received from the public and relied on the following circumstances in concluding that the prisoner suitable for parole and would not pose unreasonable risk of danger to society or threat to public safety if released from prison. We come to this conclusion, first and foremost, by the commitment offense. The offense was carried out in a manner that dispassionate and calculated. The motive was inexplicable in relation to the offense. These conclusions are drawn from the statement of facts where the prisoner, based on his conviction, used a firearm to kill the victim, then went to great length and significant deception to hide his involvement. Given his history he clearly had the opportunity and ability to choose other non-violent options but did not do so. With regard to criminal conduct, we find that criminal conduct consists of a juvenile arrest in 1957. With regard to institutional behavior we find that you programmed while in a limited manner while incarcerated. You have

described your pursuit of education as self-help, however you have a responsible job and education when you were convicted of this murder. The Panel strongly encourages you to look beyond your current education process and look to forms of self-help. With regard to your other institutional behavior we find that there is one 128 counseling chrono, the last of which was in 4/99 and one serious 115 that's been recorded in 2/1994. According to the psychological report in August 2006 by Dr. Merek, we find that it is supportive. The basis of assessing Mr. Dubyak as 'lower than the average citizen'. And looking to into the future if released and he does not find himself in a similar situation seems at best questionable. And seemingly based on a questionable, seeming to base the question on whether or not Mr. Dubyak had committed the crime for which he has been convicted. We also note that seems to be in conflict with the prior assessment. This is the one in 2003 from Dr. Steward, where in the assessment of dangerousness, item B if release to the community is not possible to predict the dangerousness since he did not discuss the event and the details of the conviction. Since inmate Dubyak is not a mass murderer it is unlikely he would recommit such an offense, however if he were to become involved in a trusting and intimate relationship in which he feels betrayed then there's potential of him handling the

situation in a similar manner. However one hopes that with maturity he would not do so. There is concern for his calculating and detached nature in which he conducted himself during the investigation. And I would underline however that this is simply the doctor report and the Panel again does not hold the fact that he does not discuss his conviction against him. With regard to parole plans, we find that you do have appropriate residential parole plans. With regard to employment, the Panel notes that you are eligible for Social Security. The plan to be a day trader is something that the Panel cannot assess, except to say that does not seem to be a strong option with the track record of success for most people. With regard to the 3042 notices we note that the District Attorney from San Bernardino County is here in person by representative and does oppose parole. And never the less we want to commend you for obtaining your B.S. from Embry-Middle University, for your accounting work the class that you just completed and are awaiting the results, your real estate course, for being a ~~wayne~~ WING porter with satisfactory rating through 2003. However there has been no rating since 2003 that we can find. These positive aspects of behavior do not outweigh the factors for unsuitability. In a separate decision, the Hearing Panel finds the prison has been convicted of murder and it is not reasonable to expect him to that

parole to be granted within the next three years. We come to this conclusion, first and foremost, by the commitment offense. The offense was carried out in a manner that dispassionate and calculated manner. The motive was inexplicable in relation to the offense. These conclusions are drawn from the statement of facts wherein the prisoner, based on his conviction, used a firearm to kill the victim, then went to great lengths and significant deception to hide his involvement. Given his history he clearly had the opportunity and ability to choose other non-violent options but did not do so. We find that there is criminal conduct that exists with a juvenile arrest in 1957, however that you have programmed in a limited manner while incarcerated. You have described your pursuit of education as self-help, however you have a responsible job and education when you committed the murder. The Panel strongly encourages you to look beyond your current education process and look to other forms of self-help. There are two incidents of disciplines while incarcerated one a 128 counseling chrono in 4/99 and one serious 115 disciplinary report in 2/1994. The psychological report of August 2006 by Dr. Merek is supportive. However is somewhat questionable on part of the Panel for all of the reasons previously quoted in the first decision. In regard to the parole plans, we do note that you have appropriate plans for a

residence. And do have an (inaudible) for Social Security. However the plan to be a day trader is something that the Panel cannot assess. Except to say that it does not seem to be a strong option with the track record of success for most people. With regard to the 3042 notices we note that the District Attorney from San Bernardino County is here in person by representative and does oppose parole. With regard to recommendation, the Panel would recommend that you have no more 115s, 128s, and 128(a)s, that you would participate in self-help programs. I would encourage you that if you do not find a program that are appropriate for you or that you can participate in because you think that limitations that you look to some independent reading in the area of self-help. And the Panel would accept book reports, some sort of report, two or three paragraphs, indicating that you understand that you read and the impact that it had on you and the effect that it had on you. That you continue to earn positive chronos. Commissioner do you have anything you'd like to add?

DEPUTY COMMISSIONER BLONIEN: No I don't, thank you.

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PRESIDING COMMISSIONER DAVIS: All right, we wish you the best of luck and we are adjourned.

A D J O U R N M E N T

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PAROLE DENIED THREE YEARS

THIS DECISION WILL BE FINAL ON: February 21, 2007

YOU WILL BE PROMPTLY NOTIFIED IF, PRIOR TO THAT DATE, THE DECISION IS MODIFIED.

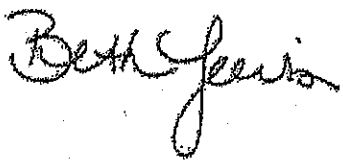
CERTIFICATE AND

DECLARATION OF TRANSCRIBER

I, BETH LEWIS, a duly designated transcriber, NORTHERN CALIFORNIA COURT REPORTERS, do hereby declare and certify under penalty of perjury that I have transcribed tape(s) which total two in number and cover a total of pages numbered 1 through 44, and which recording was duly recorded at CORRECTIONAL TRAINING FACILITY, in SOLEDAD, CALIFORNIA, in the matter of the SUBSEQUENT PAROLE CONSIDERATION HEARING of SAMUEL DUBYAK, CDC No. D-54700, on OCTOBER 24, 2006 and that the foregoing pages constitute a true, complete, and accurate transcription of the aforementioned tape(s) to the best of my ability.

I hereby certify that I am a disinterested party in the above-captioned matter and have no interest in the outcome of the hearing.

Dated January 14, 2007 at Sacramento County, California.



Beth Lewis
Transcriber
Northern California Court Reporters

EXHIBIT

B

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FIVE

In re MIKAEL SCHIOLD, Petitioner-Appellee, On Habeas Corpus.	A103107

San Francisco County Superior Court No. 4523
The Honorable Ksenia Tsenin, Judge

SETTLEMENT AGREEMENT AND FULL AND FINAL RELEASE OF ALL CLAIMS

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Attorney General of the State of California

ROBERT R. ANDERSON
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Attorneys for Respondents/Appellants

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FIVE

In re MIKAEL SCHIOLD, Petitioner-Appellee, On Habeas Corpus.	A103107

SETTLEMENT AGREEMENT AND FULL AND FINAL RELEASE OF ALL CLAIMS

"Releasor": MIKAEL SCHIOLD

"Releasees": GRAY DAVIS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF CALIFORNIA; THE BOARD OF PRISON TERMS; MICHAEL E. KNOWLES, IN HIS OFFICIAL CAPACITY AS THE WARDEN OF MULE CREEK STATE PRISON; AND CAROL A. DALY, IN HER OFFICIAL CAPACITY AS THE CHAIRPERSON OF THE BOARD OF PRISON TERMS

1. Releasor, petitioner-appellee Mikael Schiold, is currently in the custody of the California Department of Corrections pursuant to his conviction by guilty plea to second-degree murder while using a deadly weapon. Schiold's sentence is fifteen years to life plus one year. Schiold is identified by the Department of Corrections as inmate number D-31112.

2. The Board of Prison Terms found Schiold suitable for parole on April 11, 2002. On September 6, 2002, the Governor reversed that decision and found Schiold unsuitable for parole.

3. Schiold filed a petition for writ of habeas corpus in San Francisco

Superior Court, Case No. 4523, challenging the Governor's determination that he was unsuitable for parole. The Superior Court granted that petition, and respondents-appellants appealed to the First District Court of Appeal, Case No. A103107.

4. Releasor and releasees desire to enter into this settlement agreement in order to provide for a recommendation that Schiold be transferred to the custody of Sweden under the Convention on the Transfer of Sentenced Persons in full settlement of all claims which are or might have been the subject of the petition in this case, upon the terms and conditions set forth below.

5. This release is executed in consideration of the Board of Prison Terms submitting, with its approval, the application of Schiold for custodial transfer to Sweden under Government Code section 12012.1 and the Convention on the Transfer of Sentenced Persons.

6. Releasor Schiold agrees that upon approval of the transfer by the United States Department of Justice, Sweden, and any other necessary entities, and upon transfer to Sweden, he will stipulate to vacate the San Francisco Superior Court's order granting the petition in Case No. 4523. Releasor Schiold further agrees that pursuant to the satisfaction of the conditions of this paragraph, he will then dismiss the petition in San Francisco Superior Court Case No. 4523.

7. Releasor and releasees agree to stay Court of Appeal Case No. A103107 pending resolution of this settlement. The stay shall immediately terminate on October 29, 2003 if before that date releasees have not fully complied with their obligations set forth in paragraph 5. Moreover, the stay shall immediately terminate on December 25, 2003 if releasor Schiold is not in Sweden prior to that date. However, with respect to the immediately preceding sentence only, releasees may file a motion to continue the stay

past December 25, 2003 based upon a showing that the transfer process is proceeding expeditiously. If the stay terminates pursuant to the terms of this paragraph, releasor and releasees agree that the filing and service of the opening brief in Court of Appeal Case No. A103107 will be due two weeks after the stay terminates. Releasees agree to voluntarily dismiss that appeal upon releasor's dismissal of the petition described in paragraph 6.

8. Releasor agrees that he will be held in custody by the government of Sweden until January 1, 2007.

9. Releasees agree that so long as Schiold and the government of Sweden comply with this agreement, they will take no further action against releasor arising from his conviction in San Francisco County Superior Court Case No. 119276.

10. Upon full satisfaction of the conditions set forth in paragraph 6, Schiold thereafter fully and forever releases and discharges: the respondents-appellants in the above-captioned case and in San Francisco Superior Court Case No. 4523; the State of California; the California Department of Corrections; the Chairperson of the Board of Prison Terms; and each of their employees, agents, servants, and other representatives, past and present, from all claims, demands; actions, and causes of action, including claims for attorneys' fees, court costs, and other costs of suit, that are or could have been the subject of the petition for writ of habeas corpus in San Francisco Superior Court Case No. 4523. This release expressly does not apply to the obligations set forth in this settlement agreement.

11. In making this release, Schiold understands and agrees that he relies wholly upon his own judgment, belief and knowledge as to the nature, extent, effect, and duration of liability. The making of this release is without reliance upon any statement or representation of any of the releasees or their agents.

12. It is expressly understood by Schiold that the approval and submitting of the application for transfer under the Convention on the Transfer of Sentenced Persons referenced in paragraph 5 of this release constitutes a compromise of a disputed claim, and that the releasees expressly deny any and all liability in the above-captioned case.

13. This agreement shall constitute the entire agreement between releasor and releasees, including attorney's fees, arising from the actions described in paragraph 3, and it is expressly understood and agreed that this agreement has been freely and voluntarily entered into by all parties, and each of them. It may not be altered, amended, modified, or otherwise changed in any respect except by writing duly executed by the parties to this agreement.

14. This agreement shall be governed by and construed in accordance with the laws of the State of California.

15. This release is freely and voluntarily made. Schiold has not been influenced to any extent in making this release by any representations or statements made by any of the releasees or their agents except as set out herein.

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16. Facsimile signatures shall bind the parties to this agreement.

Date: 10/22/03

ETHAN A. BALOGH
KEKER & VAN NEST
Attorneys for Petitioner-Appellee Mikael Schiold

Date: 10/22/03

ANYA BENSACCA
Supervising Deputy Attorney General
Attorney for Releasees Gray Davis, in his official capacity as Governor of the State of California; the Board of Prison Terms; Michael E. Knowles, in his official capacity as the Warden of Mule Creek State Prison; and Carol A. Daly, in her official capacity as the Chairperson of the Board of Prison Terms

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EXHIBIT C

LAW OFFICES OF
PICONE & DEFILIPPIS
625 North First Street
San Jose, CA 95112

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In re,

ROBERT ROSENKRANTZ,

Petitioner,

On Habeas Corpus

Case No.: BH003529
ORDER RE: WRIT OF HABEAS CORPUS

The court has read and considered petitioner's Writ of Habeas Corpus filed on August 17, 2005, as well as the return and denial filed in response to the court's order to show cause. Having independently reviewed the record, giving deference to the broad discretion of the Board of Prison Hearings ("Board") in parole matters, the court concludes that the Board's decision denying petitioner parole is not supported by "some evidence."

Petitioner is currently serving a sentence of 15 years to life with a two-year firearm enhancement following his 1986 conviction of second degree murder. Petitioner's minimum eligible parole date was January 23, 1996. Petitioner asserts constitutional claims, including the argument that the Board violated its regulations and petitioner's right to due process by its refusal to set a parole date despite its inability to find him unsuitable for parole or to deem him an unreasonable risk to public safety if paroled.

On April 25, 2005, the Board denied petitioner parole for one year. In denying petitioner parole, the Board relied upon the circumstances of the commitment offense. When determining

unsuitability based on commitment offense, the Board may consider as a factor whether the victim was abused, defiled or mutilated during or after the offense. (See Cal. Code Regs., tit. 15, § 2402(c)(1)(C).) Here, the Board found that the victim was "abused" due to "the number of times he was shot and the manner in which he was shot." In addition, the Board concluded that the case "rises to the highest level of second-degree murder." The Board further stated in its decision that the Deputy District Attorney and the Los Angeles Sheriff's Department opposed parole. While the Board is required to consider such opposition (see Penal Code section 3042), that opposition is not a factor on which the Board may rely to deny parole as enumerated in title 15, section 2281 of the California Code of Regulations.

Towards the conclusion of the hearing, the Board summarily mentioned its concern that petitioner is a danger to his brother, Joey. The court finds that this assertion is not only unsupported by the record, but belied by the record, which contains documented evidence that contradicts any fear that the petitioner is a threat to his brother's safety. Furthermore, the court rejects the Board's inference that the absence of yearly supportive letters from petitioner's brother shows that petitioner is a danger to his brother. In fact, the petitioner's denial and traverse draws attention to a recent psychological evaluation addressing and dismissing the Board's concern for the safety of petitioner's brother. However, because this psychological evaluation was not evidence before the Board at the time of petitioner's hearing, the court may not properly rely upon it in reviewing the Board's decision. Regardless, the court finds that there is no evidence in the record that supports the conclusion that petitioner remains a danger to his brother.

The Board's sole reliance on the gravity of the offense to justify denial of parole can be initially justified as fulfilling the requirements set forth by state law. (*Biggs v. Terhune* (9th Cir. 2003) 334 F.3d 910, 916.) However, over time, should petitioner continue to demonstrate exemplary behavior and evidence of rehabilitation, denying a parole date simply because of the nature of the commitment offense raises serious questions involving his liberty interest in parole. (*Id.* at p. 917.) Here, petitioner's record is replete with reports of petitioner's exemplary conduct as well as his vocational and educational achievements over a period of many years. Indeed,

petitioner is a model prisoner in every respect. A parole decision supported by some evidence may nonetheless abrogate due process if it did not consider and weigh all favorable evidence. (*In re Capistran* (2003) 107 Cal.App.4th 1299, 1306.)

The court finds that petitioner's continual parole denials have been based mainly on the gravity of the commitment offense, the circumstances of which can never change. Therefore, the Board's continued sole reliance on the commitment offense will essentially convert petitioner's original sentence of life with the possibility of parole into a sentence of life without the possibility of parole. Petitioner has no chance of obtaining parole unless the Board holds that his crime was not serious enough to warrant a denial of parole. (*Irons v. Warden* (E.D. Cal. 2005) 358 F.Supp.2d 936, 947.)

Prior Board panels have found petitioner suitable for parole. Petitioner was found suitable for parole on June 18, 1996, but a review unit later disapproved the parole grant. At subsequent hearings in 1996, 1997 and 1998, petitioner was found unsuitable for parole based on the gravity of his offense. On September 9, 1999, petitioner was found unsuitable for parole but the panel set his prison term. On November 18, 1999, Governor Davis reversed petitioner's parole grant. On June 30, 2000, a new panel found petitioner suitable for parole, but Governor Davis reversed its decision on October 28, 2000. Petitioner has now served in excess of the maximum term for both second degree and first degree murder. Therefore, the commitment offense should no longer function as a factor for unsuitability and in that case, it should no longer operate as "some evidence" to support the Board's parole denial. Petitioner has reached the point in which the denial of parole can no longer be justified by reliance on his commitment offense. The Board's continued reliance on the circumstances of the offense runs contrary to the rehabilitative goals espoused by the prison system and has violated petitioner's due process.

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Therefore, this court orders that the petition for writ of habeas corpus be, and hereby is, granted.

June 26, 2006

DAVID S. WESLEY

Judge of the Superior Court

Clerk to give notice.

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EXHIBIT D

PSYCHOLOGICAL EVALUATION
FOR THE BOARD OF PAROLE HEARINGS
REVISED AUGUST 2006
PAROLE CONSIDERATION HEARING
SEPTEMBER 2006 LIFE TERM INMATE CALENDAR

CORRECTIONAL TRAINING FACILITY-SOLEDAD
August 18, 2006

This is the third psychological evaluation for the Board of Parole Hearings on inmate Samuel Dubyak, CDC# D-54700. This report is the product of a personal interview as well as a review of his central file and unit health record. This interview was a single contact for the sole purpose of preparing this report.

I. IDENTIFYING INFORMATION:

Dubyak is a 63-year-old, single, Caucasian male serving 25-years-to life for Murder in the First Degree. His stated religion is Catholic. He denies nicknames or aliases and has no unusual physical characteristics.

II. DEVELOPMENTAL HISTORY:

He had no prenatal or perinatal concerns, birth defects, abnormalities of developmental milestones, history of cruelty to animals, enuresis, arson or a history of physical or sexual abuse, either as a perpetrator or a victim. He says he was born at home.

III. EDUCATION:

He has a Bachelor of Science degree in Aeronautical Engineering. He has a 12-plus measured grade point level. He has no history of special education or academic/behavioral problems. His current interests are in legal work and in studying Spanish and French. He said he recently completed a college real estate course and two semesters of accounting.

IV. FAMILY HISTORY:

His father died of a heart attack at age 62. His mother died at 77. He has an older sister, age 69, who has five children. He has a younger brother, age 58, who has one child. No one in the family has been involved in criminal activity. He is primarily in contact with his sister, who lives in California.

V. PSYCHOSEXUAL DEVELOPMENT AND SEXUAL ORIENTATION:

He says he is a heterosexual male with no history of high-risk behavior or sexual aggression.

VI. MARITAL HISTORY:

His first marriage in 1966 lasted five years. This union produced four children. The marriage was good until the second or third year when she began to accuse him of false infidelities. They divorced in 1973. His second marriage (to Lourdes, the victim) began in 1981 and ended in 1985, when he was arrested for her murder. His file indicates that she was unfaithful to him. This marriage produced one child, who lives in Puerto Rico. He is in contact with all five children.

VII. MILITARY HISTORY:

He served in the Marine Corps from 1960 to 1963. He received an honorable discharge as a lance corporal (E-3).

VIII. EMPLOYMENT/INCOME HISTORY:

When 13 years old, he worked full-time in a grocery store so he could pursue flying lessons while attending school. At age 17, he entered the Marines. Following his discharge three years later, he entered a trade school in aeronautical engineering, while also returning to work in the same supermarket where he was employed as a teenager. From 1968 to 1972, when he was approximately 26 to 30, he worked for NCR as a warehouse foreman. From 1972 to 1976, age 30 to34, he worked in a manufacturing company in the parts department. From 1976 to 1981, age 34 to 39, he worked for a company as a production control planner. From 1981 to 1986, age 39 to 44, he worked for Hughes Aircraft as a production control analyst.

IX. SUBSTANCE ABUSE HISTORY:

He says he never abused alcohol or drugs. He rarely drank.

X. PSYCHIATRIC AND MEDICAL HISTORY:

He has several current medical problems including a pinched sciatic nerve, legs that become numb, a degenerative disc, prostate problems, stomach difficulties, carpal tunnel syndrome and has only 10% vision in his right eye. Some of the medical issues are the consequence of a 1981 car accident. Due to the pinched sciatic nerve, he walks with a cane but sometimes loses his grip.

XI. PLANS IF GRANTED RELEASE:

If paroled, he plans to live with his sister and collect Social Security. The prognosis for successful, responsible, legal, prosocial community adjustment is good.

XII. CURRENT MENTAL STATUS/TREATMENT NEEDS:

He exhibited no depressive or psychotic symptomatology. His intellectual functioning was estimated to be in the average range. He was calm, cooperative and alert. His mood,

affect and flow of thought were all normal. His insight and judgment were good. He is not currently in need of any mental health treatment.

CURRENT DIAGNOSTIC IMPRESSIONS:

AXIS I:	None
AXIS II:	None
AXIS III:	Multiple physical problems
AXIS IV:	Incarceration
AXIS V:	GAF=80

The prognosis for him maintaining his current mental status is good.

XIII. REVIEW OF LIFE CRIME:

He chose not to discuss the case. Since he has denied any role in the death of his wife, he expressed no remorse or regret.

XIV. ASSESSMENT OF DANGEROUSNESS:

Within a controlled setting, his violence potential is lower than the average inmate. He has only received one 115 and one Custodial Chrono during his incarceration. If released to the community, his violence potential is lower than the average citizen. He spent much of his adult life being responsible with the instant offense his only adult conviction. If he is, indeed, guilty of the current offense, it does not seem likely that he would commit murder again. Since he does not have a life pattern of violence, the only apparent significant risk factor and precursor to violence would be his somehow revisiting the same sort of marital scenario he had with his second wife and not seeing where this could lead. It would seem, based on his history of responsible behavior, good institutional adjustment, efforts at self-improvement, intelligence and an external desire to not return to prison, that he would be able to extricate himself from this predicament before it got worse.

XV. CLINICAL OBSERVATIONS/COMMENTS/RECOMMENDATIONS:

He is competent and responsible for his behavior and has the capacity to abide by institutional standards and has primarily done so during his incarceration. He does not have a mental health disorder that would necessitate treatment either while incarcerated or on parole. There are no obvious mandatory conditions of parole and recommendations. Parole decisions should be based on custody factors.

W.K. Marek, Ph.D.
Psychologist
Correctional Training Facility-Soledad

B. Zika, Ph.D.
Senior Psychologist
Correctional Training Facility-Soledad

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare that;

I am over 18 years of age and that I am the pro per Petitioner to the within cause of action; my complete mailing address is; Samuel A. Dubyak, D-54700, Box 689 C-115L, California State Prison, Soledad, CA 93960-0689. That I served a true and correct copy or original of the within:

PETITION FOR REVIEW, EVIDENTIARY HEARING REQUESTED.

Served on the interested parties by placing said documents in sealed envelopes with postage fully prepaid and placing each envelope in the prison U.S. Mail Box. To the address(es) listed below.

CLERK OF THE COURT
SUPREME COURT OF CALIFORNIA
350 McALLISTER St.
SAN FRANCISCO, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30 day of OCTOBER, 2007, at Soledad, CA.

Samuel A. Dubyak

Proof of Service -- Mail

PROOF OF SERVICE

Re: Case Number S157841
Case Title Dubyak (Samuel A.) on H.C. (review)

I hereby declare that I am a citizen of the United States, am over 18 years of age, and ~~am~~ am not a party in the above-entitled action. I am employed in [redacted] County of San Francisco and my business [redacted] address is 350 McAllister, room 1295, San Francisco, Ca 94102

On November 5, 2007, I served the attached document described as a Petition for review

on the parties in the above-named case. I did this by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then placed the envelopes in a U.S. Postal Service mailbox in San Francisco, California, addressed as follows:

Court of Appeal
Fourth Appellat District
3389 Twelfth Street
Riverside, Ca 92501

San Bernardino Superior Court
303 West Third Street
San Bernardino, Ca 92415

Attorney General, Los Angeles Office
300 S. Spring Street
Los Angeles, Ca 90012

I, Joseph Cornetta, declare under penalty of perjury that the foregoing is true and correct.

Executed on November 5, 2007, at San Francisco, California.

Joseph Cornetta
Signature